Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05(SH)-(231–233)-07 OF 2020
ABDUL KARIM, HAS ZANAH MEHAT AND VAZEER ALAM JJCA
8 DECEMBER 2021

Criminal Procedure — Appeal — Appeal against conviction and sentence — Whether trial judge committed any error of fact or law to warrant appellate intervention — Whether charges against accused were proven beyond reasonable doubt — Whether convictions were safe — Whether trial judge had considered all relevant factors and the law in passing sentence — Whether jail terms and fine imposed on accused were adequate and commensurate with the nature of the offences

The instant appeal was against the appellant's conviction and sentence by the High Court on seven criminal charges which were committed while the appellant ('Najib') was Malaysia's sixth Prime Minister ('PM') and also Finance Minister ('FM'). The charges were: (a) that contrary to s 23(1) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act') Najib had used his position as PM and FM for gratification to himself of a sum of RM42m by taking part in the decision of the Malaysian Government to guarantee a RM4 billion loan from the country's Pension Fund ('KWAP') to a newly-incorporated private limited company ('SRC') (in which Najib had an interest) ('the MACC charge'); (b) that contrary to s 409 of the Penal Code, Najib had committed criminal breach of trust ('CBT') over RM42m belonging to SRC over which sum he was entrusted with dominion in his capacity as an agent of the company, namely as PM, FM and Advisor Emeritus to SRC ('the CBT charges'); and (c) that contrary to s 4(1)(b) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFPUAA') he had committed the offence of money laundering of the said RM42m, being proceeds of an unlawful activity, by receiving payment of the said sum into his personal bank accounts ('the money laundering charges'). At the close of the prosecution's case, the trial judge called for Najib's defence to all the seven charges. At the end of the trial, the trial judge found that the prosecution had proven all the seven charges beyond reasonable doubt and convicted and sentenced Najib to 12 years' jail and a RM210m fine (in default five years' jail) on the MACC charge, ten years' jail on each of the three CBT charges and ten years' jail on each of the three money laundering charges. The jail terms were ordered to run concurrently and all the sentences, both custodial and fine, were stayed pending Najib's appeal against the convictions and sentences. The prosecution's case was that Najib had used his position as PM and FM to ensure that two government guarantees were given

to KWAP so that it could disburse a RM4 billion loan to SRC, which sum was spirited away to overseas destinations immediately upon its receipt. The whereabouts of that money remains unknown to this day. Sometime after the disbursement of the KWAP loan, RM42m belonging to SRC was transferred from SRC's accounts and through the accounts of two other companies to finally end up in two personal bank accounts of Najib from where the money was disbursed out to various parties. It was the prosecution's case that Najib caused the RM42m to be transferred to his personal bank accounts and that at all material times he wielded such supreme authority and control in SRC as PM, FM, Advisor Emeritus and as its sole shareholder in his capacity as MOF Incorporated ('MOF Inc') that SRC was often referred to as 'syarikat PM'.

In respect of the MACC charge, Najib's defence was that, inter alia: (i) whatever actions he took and decisions he made in respect of SRC were in the national interest and not for any personal interest; (ii) there was no nexus between his involvement in the government's decision to guarantee KWAP's RM4 billion loan to SRC and the RM42m being transferred into his personal accounts and therefore there was no question that he received 'gratification' from the use of his office as PM and FM; and (iii) he did not know that the RM42m that came into his accounts was SRC's property and the money must most likely have been so transferred by others for their own ulterior purpose and benefit.

In respect of the CBT and money laundering charges, Najib's defence was that, inter alia: (1) any action he took as MOF Inc vis a vis SRC was as the company's sole shareholder and not as its agent; (2) the acts of MOF Inc could not be regarded as the acts of the FM; (3) it was the board of directors of SRC (and not Najib in his various capacities) which was entrusted with dominion over SRC's properties; (4) there was no evidence to show that he had misappropriated SRC's properties or dealt with them dishonestly; (5) he honestly believed the funds that were in his personal accounts at all material times were not from SRC but from donations made to him by the Saudi royal family ('the Arab donations') which belief was fortified by representations made to him by one 'Jho Low' who was close to the Saudi royal family; and (6) since there was no proof that he had committed the MACC charge and the CBT charges, the RM42m that came into his personal accounts could not be regarded as proceeds of any 'unlawful activity' and hence the money laundering charges were not sustainable.

Held, unanimously dismissing the appeal and affirming the orders of the High Court:

The MACC charge:

(1) Najib contended that his actions and the decisions he took at the two Cabinet meetings to issue the government guarantees for KWAP's RM4 billion loan to SRC were in the national interest and motivated by public interest considerations commensurate with his role as PM and FM. But if SRC was indeed established for national interest purposes and

A the RM4 billion was to enable it to make strategic investments in the energy sector, then why was there a bullet drawdown of the loan when no such investments had been identified and there was no need to make such a colossal drawdown and incur interest payments. The instructions for the bullet drawdown came from Najib himself. His fingerprint could be
B seen from the time of SRC's formation, in his intervention in SRC's loan application to KWAP, his influence in the approval of the government guarantees and the rushed disbursement of the RM4 billion (which, on receipt, was immediately transferred out of jurisdiction), the non-existent investments and the brazenness with which Najib dismissed
C attempts to find out and recoup the missing funds. Since the disbursement of the loan, Najib showed a total lack of interest in the RM4 billion and did not enquire from SRC as to the whereabouts of the funds or as to how it was utilised and for what purpose. He even instructed the second Finance Minister then to keep off SRC. This
D conduct was indicative of only one thing — that once the funds were secured by SRC, over which Najib had overarching control, he was free to utilise them for his personal benefit. This was not something that could be said to have been done in the national interest (see paras 141, 283, 287 & 289).

E (2) The evidence as a whole negated Najib's contention that he was motivated by national interest considerations and not personal gain when he participated in the Cabinet meetings that approved the two government guarantees. The trial judge had meticulously analysed all of
F Najib's contentions in regard to his defence to the MACC charge before dismissing them. There was no error on the trial judge's part in rejecting Najib's defence. There was full judicial appreciation of the evidence, proper application of the law to the facts and no misdirection on the trial judge's part. Accordingly, this court affirmed the trial judge's conclusion
G that Najib had failed to rebut the presumption under s 23(2) of the MACC Act on a balance of probabilities and had failed to raise a reasonable doubt in the prosecution's case in respect of the MACC charge which was proven beyond reasonable doubt. The conviction in respect of the MACC charge was safe (see paras 290–291).

H (3) The presumption under s 23(2) of the MACC Act was correctly interpreted and applied by the trial judge. The fact that Najib took part in the two Cabinet decisions to issue the government guarantees in respect of the KWAP loan to SRC was beyond question and this court agreed with the trial judge's finding that Najib's interest in SRC was more
I than a professional one that arose from his position as PM, FM and Advisor Emeritus. The factual requirements for the presumption under s 23(2) to operate were established and it brought Najib squarely within the ambit of the offence under s 23(1) of the MACC Act. The completeness of the s 23(1) offence did not depend on the receipt of

gratification as that was not an element of the offence. It was sufficient if the evidence showed that Najib had used his position to obtain gratification, ie, that when Najib took part in the two Cabinet decisions to issue the government guarantees, he did so with the intention to obtain gratification (see paras 103 & 109–112).

(4) Najib's contention that his actions were taken in the national interest was rightly debunked by the trial judge. There was simply no reason why the government would go out of its way to assist SRC, a newly-incorporated company without any track record. The speed and manner in which the loans were approved by KWAP without proper diligence, the manner in which the government guarantees were rushed and approved, the disbursement of the colossal sum of RM4 billion from KWAP and the manner in which that sum was spirited out of the country when there were no discernable investments that required the funds and the fact that the government had to incur further costs and expense when SRC defaulted on the loan repayments to KWAP were all evidence that demolished Najib's defence that he had acted in the national interest (see paras 116–117).

(5) The law did not require the nature of Najib's interest in the decision to be specified in the MACC charge. The interest element was not an integral part of the s 23(1) offence. On the other hand, s 23(2) of the MACC Act was an evidential provision and if the prosecution intended to rely on the presumption in s 23(2), then it had to establish the fact of the accused's interest in the decision or action that was the subject-matter of the charge. In the instant case, the prosecution had established the basic fact of Najib's interest to invoke the presumption. In any event, s 156 of the Criminal Procedure Code provided that no omission of particulars was material unless the accused was misled. Given the manner in which the prosecution's witnesses were cross-examined on the issue of Najib's interest in SRC and his private interest in the approval of the two government guarantees, it was clear that he was not prejudiced by any lack of particulars in the charge but knew very well what the charge entailed (see para 125).

The s 409 Penal Code charges:

(6) Despite Najib's denials of knowledge about the movement of the SRC's funds into his personal accounts, the fact remained, and the evidence showed, that Najib utilised the RM42m. He never took steps to return the money if indeed it was transferred to him without his authorisation or knowledge. There was no evidence of any inquiries, complaints or police reports being lodged in relation to those funds and no evidence was shown that the funds were used for any lawful purpose connected to SRC or for the national interest. In fact, the funds were used in some instances

for purely personal reasons as in the case of payment to contractors for renovations to Najib's private residence (see paras 292–295, 297 & 328).

(7) The evidence overwhelmingly showed the flow of the RM42m from SRC, through GMSB and IPSB. The fact that the RM42m originated from SRC could not be refuted. For the purposes of the s 409 charges, it was not necessary for the prosecution to show the source of the SRC funds or that the RM42m was a part of the RM4 billion KWAP loan. It was sufficient for the prosecution to show that the RM42m was SRC's property — and that fact was established by the prosecution by a large body of evidence (see para 299).

(8) The trial judge had comprehensively dealt with Jho Low's role and Najib's attempts to push blame and culpability on to Jho Low. Jho Low's main task in the scheme of things was to ensure that there was always sufficiency of funds in Najib's personal accounts. According to Najib's own testimony, he and Jho Low were good friends from 2011 to 2015. There was no evidence of any falling out between them and hence no reason why Jho Low would have manipulated Najib and for what purpose. Najib himself admitted that he had not lost anything but instead gained millions from the monies deposited into his accounts. The evidence showed that it was Najib alone, and not Jho Low, who benefitted from the RM42m (see paras 324–326).

(9) There was ample evidence to debunk Najib's contention that he did not know about the transactions, balances and sources of funds in his personal accounts. The Blackberry Messenger messages and chats clearly showed that Najib and Jho Low were in regular communication especially when Najib was abroad and wanted to know the balance in his accounts so that he could gauge how much he could spend. Najib admitted in evidence that it was the job of Dato Azlin, Nik Faisal and Jho Low to ensure that there were sufficient funds in his accounts so that the cheques he issued were honoured (see paras 329–330).

(10) The trial judge correctly found from the totality of the evidence that in view of Najib's all-embracing control over SRC and its board of directors in his various capacities as PM, FM, Advisor Emeritus and MOF Inc, he was the company's controlling and directing mind, its shadow director (and hence a director) and, therefore, its 'agent' as defined under s 402A of the Penal Code and thereby exercised dominion over the properties of SRC via the board of directors of the company. The trial judge correctly found from the evidence that Najib had dishonestly misappropriated and converted for his own use the RM42m belonging to SRC, resulting in wrongful gain to him and wrongful loss to SRC. The trial judge did not err in finding that the prosecution had proven the CBT charges against Najib beyond reasonable doubt. Najib's convictions on all the three CBT charges were safe (see paras 173, 177, 180, 185, 197–198, 209 & 359).

The money laundering charges:

(11) The trial judge's finding that Najib had cause for suspicion and a concomitant duty to make reasonable enquiries into the transactions that resulted in the flow of the RM42m into his personal accounts was well supported by evidence. The doctrine of willful blindness applied as the evidence overwhelmingly showed that Najib was not vigilant and had failed to take steps to ensure that the RM42m which came into his accounts was not the proceeds of any unlawful activity. As the sitting PM at the material time, he had every opportunity to use the requisite channels to enquire into the source of the funds but he took no step in that direction. In the circumstances, the trial judge rightly concluded that Najib deliberately chose not to question, probe or verify so that he could deny knowledge. The mens rea element of the money laundering offence was thus satisfied (see paras 365–369).

(12) Apart from the application of the doctrine of willful blindness, the evidence showed that Najib knew the actual source of the funds in his accounts. The facts and evidence relevant to the dishonest intention and knowledge for the CBT charges warranted the inference that Najib knew that the RM42m that flowed into his accounts were from SRC, and by virtue of that, s 4(2)(a) of the AMLATFPUAA applied. In the circumstances, the prosecution had proven all the money laundering charges against Najib beyond reasonable doubt and his convictions on those charges were safe (see paras 370–371).

The 'Arab donation' story:

(13) The 'Arab donation' story was nothing but a concoction completely bereft of credibility. There was no evidence that the RM42m in Najib's accounts came from the Saudi monarch nor was there any reasonable basis for Najib to have held that belief. The evidence clearly showed that the funds originated from SRC. If the funds were personal donations to Najib from the Saudi monarch, there was no reason for it to have been deposited into SRC's account as SRC was a government-linked company wholly owned by MOF Inc (see paras 250 & 277).

The sentence:

(14) The trial judge had adequately considered all relevant factors in passing sentence. There was no error in the application of sentencing principles. On the facts of the case, the sentences handed down were not manifestly excessive but wholly adequate and commensurate with the nature of the offences. In imposing sentence on each of the charges, the trial judge had balanced Najib's interests with that of the pain and suffering he had inflicted upon the nation (see paras 392 & 395–396).

A **[Bahasa Malaysia summary**

Rayuan semasa adalah terhadap sabitan dan hukuman perayu oleh Mahkamah Tinggi atas tujuh pertuduhan jenayah yang dilakukan ketika perayu ('Najib') merupakan Perdana Menteri Malaysia yang keenam ('PM') dan juga Menteri Kewangan ('MK'). Pertuduhan-pertuduhan tersebut adalah: (a) bahawa bertentangan dengan s 23(1) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta SPRM') Najib telah menggunakan kedudukannya sebagai PM dan MK untuk suapan kepada dirinya sendiri berjumlah RM42 juta dengan cara mengambil bahagian dalam keputusan Kerajaan Malaysia untuk menjamin pinjaman RM4 bilion daripada Kumpulan Wang Persaraan negara ('KWAP') kepada sebuah syarikat sendirian berhad ('SRC') yang baru diperbadankan (di mana Najib mempunyai kepentingan) ('pertuduhan SPRM'); (b) bahawa bertentangan dengan s 409 Kanun Keseksaan, Najib telah melakukan pecah amanah jenayah ('PAJ') ke atas RM42 juta milik SRC yang mana dia diamanahkan dengan kuasa atas kapasitinya sebagai ejen syarikat tersebut, iaitu sebagai PM, MK dan Penasihat Emeritus kepada SRC ('pertuduhan PAJ'); dan (c) bahawa bertentangan dengan s 4(1)(b) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 ('APPWHPPKHAH') dia telah melakukan kesalahan pengubahan wang haram RM42 juta tersebut, iaitu hasil daripada aktiviti haram, dengan menerima pembayaran jumlah tersebut ke dalam akaun bank peribadinya ('pertuduhan pengubahan wang haram'). Pada akhir kes pendakwaan, hakim bicara memerintahkan Najib membela diri ke atas kesemua tujuh pertuduhan. Pada akhir perbicaraan, hakim bicara mendapati bahawa pihak pendakwaan telah membuktikan kesemua tujuh pertuduhan melampaui keraguan yang munasabah dan mensabitkan kesalahan serta menjatuhkan hukuman kepada Najib penjara 12 tahun dan denda RM210 juta (atau penjara lima tahun jika gagal bayar) atas pertuduhan SPRM, penjara sepuluh tahun bagi setiap daripada tiga pertuduhan PAJ dan penjara sepuluh tahun bagi setiap daripada tiga pertuduhan pengubahan wang haram. Syarat pemenjaraan tersebut diperintahkan berjalan serentak dan kesemua hukuman, pemenjaraan dan denda, digantungkan sementara menunggu rayuan Najib terhadap sabitan dan hukuman. Kes pendakwaan adalah bahawa Najib telah menggunakan kedudukannya sebagai PM dan MK untuk memastikan dua jaminan kerajaan diberikan kepada KWAP supaya ia boleh mengeluarkan pinjaman RM4 bilion kepada SRC, yang mana wang tersebut dipindahkan ke destinasi-destinasi luar negara dengan serta merta selepas diterima. Lokasi semasa wang tersebut masih tidak diketahui sehingga hari ini. Beberapa ketika selepas pembayaran pinjaman KWAP tersebut, RM42 juta milik SRC telah dipindahkan dari akaun SRC dan melalui akaun dua syarikat lain untuk akhirnya dimasukkan ke dalam dua akaun bank peribadi Najib dari mana wang tersebut diagihkan kepada pelbagai pihak. Ia adalah kes pendakwaan bahawa Najib menyebabkan RM42 juta tersebut dipindahkan ke akaun bank peribadinya dan bahawa pada setiap masa yang

material dia memegang kuasa dan kawalan tertinggi dalam SRC sebagai PM, MK, Penasihat Emeritus dan sebagai pemegang saham tunggal dalam kapasitinya sebagai MOF Incorporated ('MOF Inc') dan SRC sering dirujuk sebagai 'syarikat PM'.

Berkenaan dengan pertuduhan SPRM, pembelaan Najib adalah bahawa, antara lain: (i) apa sahaja tindakan yang diambilnya dan keputusan yang dibuat olehnya berkenaan dengan SRC adalah dalam kepentingan negara dan bukan untuk sebarang kepentingan peribadi; (ii) tidak ada hubungan di antara penglibatannya dalam keputusan kerajaan untuk menjamin pinjaman RM4 bilion KWAP kepada SRC dan pemindahan RM42 juta tersebut ke dalam akaun peribadinya dan oleh itu tidak timbul persoalan bahawa dia menerima 'suapan' daripada penggunaan jawatannya sebagai PM dan MK; dan (iii) dia tidak tahu bahawa RM42 juta yang masuk ke dalam akaunnya adalah harta SRC dan kemungkinan besar wang tersebut telah dipindahkan oleh orang lain untuk tujuan tersembunyi dan kepentingan mereka sendiri.

Berkenaan dengan pertuduhan PAJ dan pengubahan wang haram, pembelaan Najib adalah bahawa, antara lain: (1) sebarang tindakan yang diambil sebagai MOF Inc vis a vis SRC adalah sebagai pemegang saham tunggal syarikat tersebut dan bukan sebagai ejennya; (2) Tindakan-tindakan MOF Inc tidak boleh dianggap sebagai tindakan-tindakan MK; (3) lembaga pengarah SRC (dan bukan Najib dalam pelbagai kapasitinya) yang diamanahkan dengan kuasa ke atas harta-harta SRC; (4) tidak ada keterangan yang menunjukkan bahawa dia telah melesapkan harta SRC atau menguruskannya secara curang; (5) dia sejujurnya percaya dana yang terdapat dalam akaun peribadinya pada setiap masa material bukanlah daripada SRC tetapi daripada derma yang diberikan kepadanya oleh keluarga diraja Saudi ('derma Arab') yang mana kepercayaan tersebut diperkukuhkan dengan representasi yang dibuat kepadanya oleh seorang 'Jho Low' yang rapat dengan keluarga diraja Saudi; dan (6) memandangkan tidak ada bukti bahawa dia telah melakukan pertuduhan SPRM tersebut dan pertuduhan-pertuduhan PAJ tersebut, RM42 juta yang telah masuk ke dalam akaun peribadinya tidak boleh dianggap sebagai hasil daripada apa-apa 'aktiviti haram' dan oleh itu pertuduhan pengubahan wang haram tidak boleh dipertahankan.

Diputuskan, sebulat suara menolak rayuan dan mengesahkan perintah-perintah Mahkamah Tinggi:

Pertuduhan SPRM:

(1) Najib menegaskan bahawa tindakannya dan keputusan-keputusan yang diambilnya di dua mesyuarat Kabinet untuk mengeluarkan jaminan-jaminan kerajaan bagi pinjaman RM4 bilion KWAP kepada SRC adalah dalam kepentingan negara dan didorong oleh pertimbangan kepentingan awam yang selari dengan peranannya sebagai PM dan MK. Tetapi sekiranya SRC sememangnya ditubuhkan untuk tujuan kepentingan negara dan RM4 bilion tersebut adalah untuk

membolehkannya membuat pelaburan strategik dalam sektor tenaga, maka mengapa berlaku pengeluaran pinjaman sekaligus apabila tiada pelaburan sedemikian telah dikenal pasti dan tiada keperluan untuk membuat pengeluaran yang begitu besar dan menanggung bayaran faedah. Arahan untuk pengeluaran sekaligus tersebut datang daripada Najib sendiri. Cap jarinya dapat dilihat dari masa pembentukan SRC, dalam campur tangannya dalam permohonan pinjaman SRC kepada KWAP, pengaruhnya dalam kelulusan jaminan-jaminan kerajaan dan pengeluaran terburu-buru RM4 bilion (yang, apabila diterima, segera dipindahkan keluar daripada bidang kuasa), pelaburan-pelaburan yang tidak wujud dan keangkuhan Najib semasa menolak percubaan-percubaan untuk mengetahui dan mendapatkan semula dana-dana yang hilang. Sejak pembayaran pinjaman tersebut, Najib menunjukkan ketiadaan minat terhadap RM4 bilion tersebut dan tidak bertanyakan kepada SRC tentang lokasi semasa dana tersebut atau bagaimana ia digunakan dan untuk tujuan apa. Dia juga mengarahkan Menteri Kewangan yang kedua ketika itu untuk tidak mengganggu SRC. Tingkah laku ini menunjukkan hanya satu perkara — apabila dana tersebut diperolehi oleh SRC, yang mana Najib mempunyai kawalan menyeluruh, dia bebas untuk menggunakannya untuk kepentingan peribadinya. Ini bukanlah sesuatu yang boleh dikatakan telah dilakukan demi kepentingan negara (lihat perenggan 141, 283, 287 & 289).

(2) Keterangan secara keseluruhannya menafikan dakwaan Najib bahawa dia didorong oleh pertimbangan kepentingan negara dan bukannya keuntungan peribadi apabila dia menyertai mesyuarat-mesyuarat Kabinet yang meluluskan dua jaminan kerajaan tersebut. Hakim bicara telah menganalisa dengan teliti kesemua dakwaan Najib berhubung pembelaannya terhadap pertuduhan SPRM tersebut sebelum menolaknya. Tiada kesilapan pada pihak hakim bicara dalam menolak pembelaan Najib. Terdapat penghayatan kehakiman penuh terhadap keterangan, penggunaan undang-undang yang betul ke atas fakta dan tiada salah arahan pada pihak hakim bicara. Oleh yang demikian, mahkamah ini mengesahkan kesimpulan hakim bicara bahawa Najib telah gagal untuk menyangkal anggapan di bawah s 23(2) Akta SPRM di atas imbangan kebarangkalian dan telah gagal menimbulkan keraguan yang munasabah dalam kes pendakwaan berhubung pertuduhan SPRM yang telah dibuktikan melampaui keraguan yang munasabah. Sabitan berkenaan pertuduhan SPRM adalah selamat (lihat perenggan 290–291).

(3) Anggapan di bawah s 23(2) Akta SPRM telah ditafsirkan dan diguna pakai dengan betul oleh hakim bicara. Fakta bahawa Najib telah mengambil bahagian dalam dua keputusan Kabinet untuk mengeluarkan jaminan-jaminan kerajaan berhubung pinjaman KWAP kepada SRC tidak boleh dipersoalkan dan mahkamah ini bersetuju

dengan keputusan hakim bicara bahawa kepentingan Najib dalam SRC adalah lebih daripada kepentingan profesional yang berbangkit daripada jawatannya sebagai PM, MK dan Penasihat Emeritus. Kehendak fakta untuk anggapan di bawah s 23(2) beroperasi telah dibuktikan dan ia meletakkan Najib dengan tepat di dalam lingkungan kesalahan di bawah s 23(1) Akta SPRM. Kesempurnaan kesalahan s 23(1) tidak bergantung kepada penerimaan suapan kerana itu bukan elemen kesalahan tersebut. Adalah memadai sekiranya keterangan menunjukkan bahawa Najib telah menggunakan kedudukannya untuk mendapatkan suapan, iaitu apabila Najib mengambil bahagian dalam dua keputusan Kabinet untuk mengeluarkan jaminan-jaminan kerajaan, dia berbuat demikian dengan niat untuk mendapatkan suapan (lihat perenggan 103 & 109–112).

(4) Dakwaan Najib bahawa tindakannya diambil demi kepentingan negara telah dibonkar dengan betul oleh hakim bicara. Tidak ada sebab mengapa kerajaan akan berusaha keras untuk membantu SRC, sebuah syarikat yang baru diperbadankan tanpa sebarang rekod prestasi. Kepantasan dan cara pinjaman diluluskan oleh KWAP tanpa langkah berjaga-jaga yang sewajarnya, cara di mana jaminan-jaminan kerajaan digesa dan diluluskan, pembayaran sejumlah besar RM4 bilion daripada KWAP dan cara jumlah wang tersebut dikeluarkan daripada negara apabila tiada pelaburan jelas yang menghendaki dana tersebut dan fakta bahawa kerajaan terpaksa menanggung kos-kos dan perbelanjaan tambahan apabila SRC gagal membayar balik pinjaman kepada KWAP adalah kesemuanya keterangan yang memusnahkan pembelaan Najib bahawa dia telah bertindak demi kepentingan negara (lihat perenggan 116–117).

(5) Undang-undang tidak menghendaki sifat kepentingan Najib dalam keputusan tersebut dinyatakan dalam pertuduhan SPRM tersebut. Elemen kepentingan bukanlah sebahagian penting daripada kesalahan di bawah s 23(1). Sebaliknya, s 23(2) Akta SPRM adalah suatu peruntukan keterangan dan sekiranya pihak pendakwaan berhasrat untuk bergantung kepada anggapan dalam s 23(2), maka ia perlu membuktikan fakta kepentingan tertuduh dalam keputusan atau tindakan yang menjadi hal perkara pertuduhan. Dalam kes semasa, untuk menggunakan anggapan tersebut, pihak pendakwaan telah membuktikan fakta asas kepentingan Najib. Dalam apa jua keadaan, s 156 Kanun Tatacara Jenayah memperuntukkan bahawa ketinggalan butir-butir adalah tidak material kecuali tertuduh telah terkeliru. Berdasarkan cara saksi-saksi pihak pendakwaan telah disoal balas atas isu kepentingan Najib dalam SRC dan kepentingan peribadinya dalam kelulusan dua jaminan kerajaan, adalah jelas bahawa dia tidak diprejudiskan dengan kekurangan butiran dalam pertuduhan tersebut tetapi mengetahui dengan jelas apa yang terlibat dalam pertuduhan tersebut (lihat perenggan 125).

Pertuduhan di bawah s 409 Kanun Keseksaan:

(6) Walaupun Najib menafikan pengetahuan tentang pergerakan dana-dana SRC ke dalam akaun-akaun peribadinya, faktanya kekal, dan keterangan menunjukkan, bahawa Najib telah menggunakan RM42 juta tersebut. Dia tidak pernah mengambil langkah untuk memulangkan wang tersebut sekiranya wang tersebut sememangnya dipindahkan kepadanya tanpa kebenaran atau pengetahuannya. Tiada keterangan berkenaan apa-apa pertanyaan, aduan atau laporan polis dibuat berhubung dengan dana tersebut dan tiada keterangan menunjukkan bahawa dana tersebut digunakan untuk sebarang tujuan sah yang berkaitan dengan SRC atau untuk kepentingan negara. Malah, dana tersebut digunakan dalam beberapa keadaan untuk sebab peribadi semata-mata seperti dalam kes pembayaran kepada kontraktor-kontraktor untuk pengubahsuaian kediaman peribadi Najib (lihat perenggan 292–295, 297 & 328).

(7) Keterangan menunjukkan aliran RM42 juta daripada SRC melalui GMSB dan IPSB. Fakta bahawa RM42 juta berasal dari SRC tidak dapat disangkal. Bagi tujuan pertuduhan s 409, pihak pendakwaan tidak perlu menunjukkan sumber dana-dana SRC atau RM42 juta tersebut adalah sebahagian daripada pinjaman RM4 billion KWAP. Adalah memadai bagi pihak pendakwaan untuk menunjukkan bahawa RM42 juta tersebut adalah hak milik SRC — dan fakta tersebut telah dibuktikan oleh pihak pendakwaan melalui rangkaian keterangan yang besar (lihat perenggan 299).

(8) Hakim bicara telah menangani secara komprehensif peranan Jho Low dan percubaan Najib untuk menolak kesalahan dan kebersalahan kepada Jho Low. Tugas utama Jho Low dalam perancangan adalah untuk memastikan sentiasa ada kecukupan dana dalam akaun peribadi Najib. Menurut keterangan Najib sendiri, dia dan Jho Low merupakan kawan baik dari 2011 hingga 2015. Tidak ada keterangan mengenai sebarang perbalahan antara mereka dan oleh itu tiada sebab mengapa Jho Low akan memanipulasi Najib dan untuk tujuan apa. Najib sendiri telah mengakui bahawa dia tidak kehilangan apa-apa tetapi sebaliknya memperoleh berjuta-juta daripada wang yang telah didepositkan ke dalam akaunnya. Keterangan menunjukkan bahawa hanya Najib sahaja, dan bukan Jho Low, yang mendapat manfaat daripada RM42 juta tersebut (lihat perenggan 324–326).

(9) Terdapat banyak keterangan untuk menafikan dakwaan Najib bahawa dia tidak tahu mengenai transaksi-transaksi, baki-baki dan sumber dana-dana dalam akaun-akaun peribadinya. Mesej dan persembangan dalam Blackberry Messenger jelas menunjukkan bahawa Najib dan Jho Low dalam komunikasi tetap terutamanya semasa Najib berada di luar negara dan ingin mengetahui baki dalam akaunnya supaya dia boleh membuat anggaran berapa banyak yang boleh dibelanjakan. Najib

mengakui dalam keterangan bahawa adalah menjadi tugas Dato Azlin, Nik Faisal dan Jho Low untuk memastikan terdapat dana yang mencukupi dalam akaunnya supaya cek-cek yang dikeluarkannya boleh digunakan (lihat perenggan 329–330).

(10) Hakim bicara telah membuat dapatan yang betul daripada keseluruhan keterangan bahawa memandangkan Najib menguasai sepenuhnya SRC dan lembaga pengarahnya dalam pelbagai kapasiti sebagai PM, MK, Penasihat Emeritus dan MOF Inc, dia adalah minda yang mengawal dan mengarahkan syarikat tersebut, pengarah terselindung (dan oleh itu seorang pengarah) dan, oleh yang demikian, 'ejen' syarikat tersebut seperti yang ditakrifkan di bawah s 402A Kanun Keseksaan dan dengan itu mempunyai penguasaan ke atas harta-harta SRC melalui lembaga pengarah syarikat. Hakim bicara dengan betul mendapati daripada keterangan bahawa Najib telah secara tidak jujur melesapkan dan menukar untuk kegunaannya sendiri RM42 juta milik SRC, mengakibatkan keuntungan salah kepadanya dan kerugian salah kepada SRC. Hakim bicara tidak terkhilaf apabila mendapati bahawa pihak pendakwaan telah membuktikan pertuduhan PAJ terhadap Najib melampaui keraguan yang munasabah. Sabitan terhadap Najib atas ketiga-tiga pertuduhan PAJ adalah selamat (lihat perenggan 173, 177, 180, 185, 197–198, 209 & 359).

Pertuduhan pengubahan wang haram:

(11) Dapatan hakim bicara bahawa Najib mempunyai sebab untuk mengesyaki dan kewajipan bersamaan untuk membuat siasatan munasabah terhadap transaksi-transaksi yang mengakibatkan pengaliran RM42 juta ke dalam akaun peribadinya disokong dengan keterangan. Doktrin 'willful blindness' terpakai kerana banyak keterangan menunjukkan Najib tidak berjaga-jaga dan gagal mengambil langkah-langkah untuk memastikan RM42 juta yang masuk ke dalam akaunnya bukan hasil daripada sebarang aktiviti haram. Sebagai PM yang berkhidmat pada masa material, dia mempunyai setiap peluang untuk menggunakan saluran yang diperlukan untuk menyiasat sumber dana-dana tetapi dia tidak mengambil langkah ke arah itu. Dalam keadaan itu, hakim bicara dengan tepat menyimpulkan bahawa Najib sengaja memilih untuk tidak menyoal, menyiasat atau mengesahkan supaya dia boleh menafikan pengetahuan. Elemen mens rea bagi kesalahan pengubahan wang haram telah dipenuhi (lihat perenggan 365–369).

(12) Selain daripada penggunaan doktrin 'willful blindness', keterangan menunjukkan bahawa Najib mengetahui sumber sebenar dana di dalam akaunnya. Fakta dan keterangan yang berkaitan dengan niat dan pengetahuan tidak jujur bagi pertuduhan PAJ mewajarkan inferens bahawa Najib mengetahui bahawa RM42 juta yang mengalir ke dalam

akaunnya adalah daripada SRC, dan berdasarkan itu, s 4(2)(a) APPWHPPKHAH adalah terpakai. Dalam keadaan tersebut, pihak pendakwaan telah membuktikan kesemua pertuduhan pengubahan wang haram terhadap Najib melampaui keraguan yang munasabah dan sabitan ke atasnya bagi pertuduhan-pertuduhan tersebut adalah selamat (lihat perenggan 370–371).

Kisah 'derma Arab':

(13) Kisah 'derma Arab' tersebut hanyalah sesuatu yang direka semata-mata dan kekurangan kredibiliti. Tidak ada keterangan bahawa RM42 juta di dalam akaun Najib datang daripada raja Saudi dan tidak ada asas munasabah untuk Najib berpegang kepada kepercayaan tersebut. Keterangan jelas menunjukkan bahawa dana-dana tersebut berasal daripada SRC. Sekiranya dana tersebut adalah derma peribadi kepada Najib daripada raja Arab Saudi, tidak ada sebab untuk ianya dimasukkan ke dalam akaun SRC memandangkan SRC ialah syarikat berkaitan kerajaan yang dimiliki sepenuhnya oleh MOF Inc (lihat perenggan 250 & 277).

Hukuman:

(14) Hakim bicara telah mempertimbangkan kesemua faktor yang relevan dengan secukupnya dalam menjatuhkan hukuman. Tiada kekhilafan dalam penggunaan prinsip-prinsip hukuman. Berdasarkan fakta kes, hukuman yang dijatuhkan tidaklah terlalu berlebihan tetapi adalah mencukupi dan setimpal dengan sifat kesalahan-kesalahan tersebut. Dalam menjatuhkan hukuman bagi setiap pertuduhan, hakim bicara telah mengimbangi kepentingan Najib dengan keperitan dan penderitaan yang ditimpakan ke atas negara (lihat perenggan 392 & 395–396).]

Cases referred to

Abdul Hadi bin Bokhari v PP [2009] MLJU 1581; [2009] 1 LNS 1678, HC (refd)

Abdullah bin Atan v PP and other appeals [2020] 6 MLJ 727; [2020] 9 CLJ 151, FC (refd)

Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)

Aisyah bt Mohd Rose & Anor v PP [2016] 1 MLJ 840; [2016] 1 CLJ 529, CA (folld)

Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1, FC (refd)

Azmi bin Osman v PP and another appeal [2016] 3 MLJ 98; [2015] 9 CLJ 845, CA (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)

Bank of Tokyo-Mitsubishi (Malaysia) Berhad v Sim Lim Holdings Berhad & Ors [2001] MLJU 125; [2001] 2 CLJ 474, HC (refd)

Bhandulananda Jayatilake v PP [1982] 1 MLJ 83; [1981] 1 LNS 139, FC (folld)

Chang Cheng Hoe & Ors, Re [1966] 2 MLJ 252; [1966] 1 LNS 155 (refd)
Chang Lee Swee v PP [1985] 1 MLJ 75; [1984] 1 LNS 134 (refd)
Chua Keem Long v PP [1996] 1 SLR 510, HC (refd)
Dato Mohamed Hashim Shamsuddin v Attorney-General, HongKong [1986] 2 MLJ 112, SC (folld)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193; [2002] 3 CLJ 457, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP and another appeal [2004] 3 MLJ 405; [2004] 3 CLJ 737, FC (refd)
Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya [2019] MLJU 190; [2019] 5 CLJ 93, HC (refd)
Dato' Sri Mohd Najib bin Hj Abdul Razak v PP [2019] 4 MLJ 180; [2019] 5 CLJ 23, CA (refd)
Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya [2019] MLJU 282; [2019] 1 LNS 434, FC (refd)
Datuk Haji Harun bin Haji Idris & Ors v PP [1978] 1 MLJ 240; [1977] 1 LNS 24, FC (refd)
Datuk Sahar bin Arpan v PP [2007] 1 MLJ 697; [2007] 1 CLJ 326, CA (refd)
Devinthiran a/l Manni v PP [2017] 2 MLJ 410, CA (refd)
Goh Lai Wak v PP [1994] 1 SLR 748; [1994] SGCA 32, CA (refd)
Ho Yee Onn v PP [2020] 2 MLJ 789, CA (refd)
Husdi v PP [1979] 2 MLJ 304 (folld)
Hydrodam (Corby) Ltd, Re [1994] 2 BCLC 180, Ch D (refd)
Junaidi bin Abdullah v PP [1993] 3 MLJ 217, SC (refd)
Lee Lee Chong v PP [1998] 4 MLJ 697, CA (refd)
Lim Yoon Fah v PP [1971] 1 MLJ 37; [1970] 1 LNS 66 (refd)
Mahadzir bin Yusof & Anor v PP [2011] 1 MLJ 297, CA (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Mohamad Hanafi bin Mohamad Hashim lwn Pendakwa Raya [2016] 3 MLJ 723, CA (refd)
Mohamad Taip bin Johari v PP [2018] MLJU 1894; [2018] 1 LNS 1979, HC (refd)
Mohamad bin Ahmad v PP [2015] MLJU 2239, CA (refd)
Mohamed Ramly bin Haji Rasip v PP [1941] 1 MLJ 31 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167; [1987] 2 CLJ 405; [1987] CLJ Rep 209, SC (refd)
Mohd Johi bin Said & Anor v PP [2005] 5 MLJ 409; [2005] 1 CLJ 389, CA (refd)
Mohd Yusri bin Mangsor & Anor v PP and another appeal [2014] 4 MLJ 875; [2014] 7 CLJ 897, CA (refd)
Muhammad Lukman bin Mohamad v PP [2021] 4 MLJ 494; [2021] 7 CLJ 524, FC (refd)
Ng Kim Huat v PP [1961] 1 MLJ 308 (refd)

A *Ng Tiam Kok & lain-lain lwn Pendakwa Raya* [2013] 1 MLJ 342, CA (refd)
PP v Amir Dagang [2009] MLJU 1881; [2009] 10 CLJ 448, HC (refd)
PP v R Balasubramaniam [1948] 1 MLJ 119 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
PP v Cho Sing Koo & Anor [2015] 4 MLJ 689; [2015] 4 CLJ 491, CA (refd)
B *PP v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 (refd)
PP v Dato Haji Mohamed Muslim bin Haji Othman [1983] 1 MLJ 245; [1982] 1 LNS 71 (refd)
Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
C *PP v Dato' Rahmat bin Asri & Anor* [1992] MLJU 7, HC (refd)
PP v Dato' Waad bin Mansor [2005] 2 MLJ 101; [2005] 1 CLJ 421, FC (folld)
PP v Lawrence Tan Hui Seng [1993] MLJU 657; [1993] 4 CLJ 221, SC (refd)
PP v Lim Teong Seng and 2 others [1946] 1 MLJ 108 (refd)
PP v Ling Leh Hoe [2015] MLJU 1006; [2015] 4 CLJ 869, CA (refd)
D *PP v Loo Choon Fatt* [1976] 2 MLJ 256; [1976] 1 LNS 102 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
PP v Shahrul Azuwan bin Adanan & Anor [2013] 8 MLJ 70; [2013] 2 CLJ 686, HC (refd)
E *PP v Teo Heng Chye* [1989] 3 MLJ 205; [1990] 1 CLJ 194; [1990] 3 CLJ Rep 904, HC (refd)
PP v Yeoh Teck Chye and Lim Hong Pung & Anor v PP [1981] 2 MLJ 176; [1981] 1 LNS 93, FC (refd)
PP v Yuvaraj [1969] 2 MLJ 89; [1968] 1 LNS 116, PC (refd)
F *Parlan bin Dadeh v PP* [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
Pendakwa Raya v Mansor b Mohd Rashid & Anor [1996] 3 MLJ 560, FC (refd)
Periasamy s/o Sinnappan & Anor v PP [1996] 2 MLJ 557; [1996] 3 CLJ 187, CA (refd)
Prasit Punyang v PP [2014] 4 MLJ 282; [2014] 7 CLJ 392, CA (refd)
G *Sathiadas v PP* [1970] 2 MLJ 241 (refd)
Satli bin Masot v PP [1999] 2 SLR 637, CA (refd)
Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd [2019] 1 MLJ 495; [2018] 1 LNS 898, CA (refd)
Shaw v R (1952) 85 CLR 365, HC (refd)
H *Sinnathamby v PP* [1948–1949] supp MLJ 75 (refd)
Siti Aishah bt Sheikh Abd Kadir v PP [2013] 6 MLJ 86, CA (refd)
Siti Aisyah v PP [2019] 4 MLJ 46; [2019] 7 CLJ 27, CA (refd)
Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707; [2002] 3 CLJ 624, CA (refd)
I *William Minggu a/k Nyegang & Anor v PP* [2002] 3 MLJ 583, HC (refd)
Wong Kai Chuen Philip v PP [1991] 1 MLJ 321; [1990] 1 LNS 146, HC (refd)
Yap Chai Chai & Anor v PP [1973] 1 MLJ 219, FC (refd)
Yap Khay Cheong Sdn Bhd v Susan George a/p TM George [2019] 1 MLJ 410; [2018] 5 CLJ 345, CA (refd)

Yap Sing Hock & Anor v PP [1992] 2 MLJ 714; [1992] 4 CLJ 1950; [1992] 1 CLJ Rep 356, SC (refd)
Yusof bin Omar v Pendakwa Raya [2001] 2 MLJ 209; [2001] 3 CLJ 122, CA (refd)

Legislation referred to

Anti-Corruption Act 1997 (repealed by the Malaysian Anti-Corruption Commission Act 2009) ss 2, 15, 15(2)
Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3, 4, 4(1), (1)(a), (1)(b), (1)(c), (1)(d), (2), (2)(a), (2)(b), Second Schedule
Companies Act 1965 (repealed by Companies Act 2016)
Criminal Procedure Code ss 51A, 156, 163, 164, 165, 165(1), 166, 170, 180, 180(3), 182A, 183
Evidence Act 1950 s 8
Federal Constitution art 145(3)
Interpretation Acts 1948 and 1967 s 17A
Loans Guarantee (Bodies Corporate) Act 1965 ss 2, 2(2), 6, 7
Malaysian Anti-Corruption Commission Act 2009 ss 3, 23, 23(1), (2), (4), 62
Penal Code ss 23, 24, 402A, 402B, 403, 404, 405, 406, 407, 408, 409, 409A, 409B, 415, 416, 417, 418, 419, 420

Appeal from: Crimimal Trial Nos WA-45(2&3)-07 of 2018 and WA-45-5–08 of 2018 (High Court, Kuala Lumpur)

Muhammad Shafee Abdullah (Harvinderjit Singh, Farhan Read, Wan Aizuddin Wan Mohammed, Rahmat Hazlan, Muhammad Farhan Muhammad Shafee, Syahirah Hanapiah, Zahria Eleena Redza and Wan Arfan Wan Othman with him) (Shafee & Co) for the appellant.
Sithambaram Vairavan (Donald Joseph Franklin, Sulaiman Kho Kheng Fuei, Ashrof Adrin Kamarul and Manjira Vasudevan with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Karim, Has Zanah Mehat and Vazeer Alam JJCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant, a former Prime Minister of Malaysia, was charged with and convicted of seven separate offences by the High Court in Malaya at Kuala Lumpur. The appellant was sentenced to various terms of imprisonment and fine.

[2] Aggrieved by that decision, the appellant appealed against both conviction and sentence in respect of all seven charges.

THE BACKGROUND FACTS

[3] The charges against the appellant were preferred under three different statutes, namely:

(a) a charge under s 23 of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) ('the MACC Act'):

Charge 1

> Bahawa kamu antara 17 Ogos 2011 dan 8 Februari 2012, di Pejabat Perdana Menteri, Presint 1, Putrajaya, di dalam Wilayah Persekutuan Putrajaya, sebagai seorang pegawai badan awam, iaitu Perdana Menteri dan Menteri Kewangan Malaysia, telah menggunakan jawatan untuk suapan bagi diri kamu berjumlah empat puluh dua juta Ringgit Malaysia (RM42,000,000.00) apabila kamu telah terlibat dalam keputusan bagi pihak Kerajaan Malaysia untuk memberikan jaminan kerajaan bagi pinjaman-pinjaman berjumlah empat bilion Ringgit Malaysia (RM4,000,000,000.00) daripada Kumpulan Wang Persaraan (Diperbadankan) kepada SRC International Sdn. Bhd., oleh yang demikian kamu telah melakukan kesalahan dibawah Seksyen 23 Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694] yang boleh dihukum dibawah Seksyen 24 Akta yang sama.

(b) three charges under s 409 of the Penal Code (Act 574) ('the Penal Code'):

Charge 1

> Bahawa kamu antara 24 Disember 2014 dan 29 Disember 2014, di AmIslamic Bank Berhad, Bangunan Ambank Group, No.55, Jalan Raja Chulan, dalam Wilayah Persekutuan, Kuala Lumpur, sebagai seorang ejen, iaitu Perdana Menteri dan Menteri Kewangan Malaysia, dan Advisor Emeritus SRC International Sdn. Bhd. ('SRC'), dan dalam kapasiti tersebut, diamanahkan dengan penguasaan ke atas wang milik SRC, telah melakukan pecah amanah jenayah terhadap wang sejumlah dua puluh tujuh juta Ringgit Malaysia (RM27,000,000.00), dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 409 Kanun Keseksaan [Akta 574].

Charge 2

> Bahawa kamu antara 24 Disember 2014 dan 29 Disember 2014, di AmIslamic Bank Berhad, Bangunan Ambank Group, No. 55, Jalan Raja Chulan, dalam Wilayah Persekutuan Kuala Lumpur, sebagai seorang ejen, iaitu Perdana Menteri dan Menteri Kewangan Malaysia, dan Advisor Emeritus SRC International Sdn. Bhd. ('SRC'), dan di dalam kapasiti tersebut, diamanahkan dengan penguasaan ke atas wang milik SRC, telah

melakukan pecah amanah jenayah terhadap wang sejumlah lima juta Ringgit Malaysia (RM5,000,000.00), dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 409 Kanun Keseksaan [Akta 574].

Charge 3

Bahawa kamu antara 10 Februari 2015 dan 2 Mac 2015, di AmIslamic Bank Berhad, Bangunan Ambank Group, No.55, Jalan Raja Chulan, dalam Wilayah Persekutuan Kuala Lumpur, sebagai seorang ejen, iaitu Perdana Menteri dan Menteri Kewangan Malaysia, dan Advisor Emeritus SRC Intemational Sdn. Bhd. ('SRC'), dan di dalam kapasiti tersebut, diamanahkan dengan penguasaan ke atas wang milik SRC, telah melakukan pecah amanah jenayah terhadap wang sejumlah sepuluh juta Ringgit Malaysia (RM10,000,000.00), dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 409 Kanun Keseksaan [Akta 574].

(c) three charges under s 4(1)(b) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613) ('the AMLA Act'):

Charge 1

Bahawa kamu, pada atau lebih kurang 26 Disember 2014, di AmIslamic Bank Berhad, Bangunan AmBank Group, No. 55, Jalan Raja Chulan, di dalam Wilayah Persekutuan Kuala Lumpur, telah menerima wang berjumlah dua puluh tujuh juta Ringgit Malaysia (RM27,000,000.00) yang merupakan hasil daripada aktiviti haram, melalui Real Time Electronic Transfer of Funds and Securities ('RENTAS') dalam akaun kamu yang bernombor 2112022011880 di AmIslamic Bank Berhad dan oleh itu kamu telah melakukan kesalahan di bawah seksyen 4(1)(b) Akta Pencegahan Penggubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram [Akta 613] yang boleh dihukum di bawah seksyen 4(1) Akta yang sama.

Charge 2

Bahawa kamu, pada atau lebih kurang 26 Disember 2014, di AmIslamic Bank Berhad, Bangunan AmBank Group, No. 55, Jalan Raja Chulan, di dalam Wilayah Persekutuan Kuala Lumpur telah menerima wang berjumlah lima juta Ringgit Malaysia (RM5,000,000,00), yang merupakan hasil daripada aktiviti haram, melalui Real Time Electronic Transfer of Funds and Securities ('RENTAS') dalam akaun kamu yang bernombor 2112022011906 di AmIslamic Bank Berhad, dan oleh itu kamu telah melakukan kesalahan di bawah seksyen 4(1)(b) Akta Pencegahan Penggubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram [Akta 613] yang boleh dihukum di bawah seksyen 4(1) Akta yang sama.

Charge 3

A
B
C

> Bahawa kamu, pada atau lebih kurang 10 Februari 2015, di AmIslamic Bank Berhad, Bangunan AmBank Group, No.55, Jalan Raja Chulan di dalam Wilayah Persekutuan Kuala Lumpur telah menerima wang berjumlah sepuluh juta Ringgit Malaysia (RM10,000,000.00) yang merupakan hasil daripada aktiviti haram, melalui Real Time Electronic Transfer of Funds and Securities ('RENTAS') dalam akaun kamu yang bernombor 2112022011880 di AmIslamic Bank Berhad, dan oleh itu kamu telah melakukan kesalahan di bawah seksyen 4(1)(b) Akta Pencegahan Penggubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram [Akta 613] yang boleh dihukum di bawah seksyen 4(1) Akta yang sama.

D
E

[4] At the close of prosecution case, where the prosecution had called 57 witnesses over 57 days, the learned High Court judge called the appellant to enter defence on all seven charges. The appellant testified under oath and additionally called 18 other witnesses to testify in his behalf during a period of 29 days. At the end of trial, the learned High Court judge found that the prosecution had proved all seven charges beyond reasonable doubt and accordingly convicted the appellant as charged on all seven counts, and proceeded to sentence the appellant as follows:

F

(a) 12 years imprisonment and a fine of RM210m (in default five years jail) for the offence under s 23 of the MACC Act;

(b) ten years imprisonment for each of the offence under s 409 of the Penal Code; and

(c) ten years imprisonment for each of the offence under s 4(1)(b) of the AMLA Act.

G

[5] The custodial sentences for all the charges were ordered to run concurrently and were to take effect from the date the sentences were passed. All the sentences, both custodial and fine, were stayed pending appeal to this court.

H

[6] Upon carefully considering the appeal records and upon hearing and reading the very lengthy and substantial oral and written submissions of learned counsel for the appellant and the learned deputy public prosecutor for the respondent, we are of the unanimous view that the appeals lack merit and that the conviction on all seven counts are safe to stand undisturbed.

I

[7] These are our reasons for the decision.

THE SALIENT FACTS IN THE CONTEXT OF THE CHARGES

[8] The salient facts of these appeals are gathered from the judgment of the learned High Court judge ('HCJ'), the appeal records and submissions of parties. We respectfully adopt them, and where necessary, with some expansion and clarification.

[9] SRC International Sdn Bhd ('SRC') was incorporated on 7 January 2011 as a private limited company under the Companies Act 1965. One of its two subscriber shareholders was Nik Faisal Ariff Kamil ('Nik Faisal'), who would later become its first chief executive officer (CEO), and the other was Vincent Beng Huat Koh. One of the main objects of incorporation, as stated in SRC's memorandum of association (P15), is to identify and invest in projects associated with the exploration, extraction, processing and trading of conventional and renewable energy resources, natural resources and minerals.

[10] Apart from being a subscriber shareholder of SRC, Nik Faisal was at the time of SRC's incorporation also the chief investment officer of 1Malaysia Development Bhd ('1MDB'). 1MDB was incorporated in 2008 originally as Terengganu Investment Authority ('TIA'), and later changed its name, and on 31 July 2009 became wholly owned by the Minister of Finance Incorporated (MOF Inc). 1MDB was established to drive strategic initiatives for the country's long term economic development, particularly in energy and real estate. One Low Taek Jho or Jho Low played a significant role as adviser to TIA, and upon the change to 1MDB, to the board of advisors of 1MDB.

[11] Prior to the incorporation of SRC, in a letter dated 24 August 2010 (P356) addressed to the appellant in his capacity as the Prime Minister and Finance Minister, the CEO of 1MDB (the holding company of SRC then), Shahrol Azral Helmi, requested a RM3 billion grant to set up SRC as a strategic resource vehicle to maintain strategic stakes in key resources such as coal, alumina, uranium and iron as well as oil and gas.

[12] The appellant as the Prime Minister wrote a minute on this 1MDB letter of 24 August 2012 to Tan Sri Nor Mohamed Yakcop, who was then the Minister in charge of the Economic Planning Unit (EPU) in the Prime Minister's Department, requesting that the application for the RM3 billion grant be studied and commented upon. The exact words in Malay used by the appellant in the minute were — 'Untuk dikaji dan dibuat ulasan'.

[13] EPU in a memo dated 12 October 2010, stated that whilst it supported the setting up of SRC, its proposed focus ought to be confined only to coal and uranium (P357). The EPU's stance was that the strategic energy resources in respect of the extraction and importation of oil and gas should continue to be

pursued by Petronas, whilst the iron and alumina sectors, which were deemed less strategic to the requirements of the country, should be driven by the private sector as presently. The EPU suggested that the funding for SRC should be sourced from financial institutions instead and refused the requested RM3 billion grant. However, EPU was prepared to give a launching grant of RM20m to set up SRC and fund its initial activities. This position and recommendation of the EPU were agreed and accepted by both the Prime Minister (P358) and the Minister in the Prime Minister's Department (EPU).

[14] Subsequently, by letter dated 3 June 2011 from SRC (P364), signed by Nik Faisal, then a director of SRC, addressed to the appellant in his capacity as the Prime Minister and Finance Minister, SRC sought funding in the form of a loan of RM3.95 billion from Kumpulan Wang Persaraan (Diperbadankan) ('KWAP') ostensibly to pursue the strategic investment plans of SRC.

[15] On 5 June 2011, the appellant wrote a minute on the SRC letter of 3 June 2011 (P364), addressed to Datuk Azian Mohd Noh (PW38) the CEO of KWAP that the appellant agreed with the proposal by SRC. The appellant wrote in the Malay language — 'YBhg Datuk Azian, setuju dengan cadangan ini'.

[16] That SRC letter (P364) addressed to the appellant, and subsequently minuted by the appellant to the CEO of KWAP, was then personally hand delivered by Datuk Azlin Alias (since deceased), who was then the principal private secretary to the Prime Minister at the Prime Minister's Office (PMO), to the CEO of KWAP after office hours at a hotel lobby in KL Sentral.

[17] The CEO of KWAP then asked the Fixed Income Department of KWAP to process this loan application from SRC. Amirul Imran Ahmat (PW29), a witness from KWAP testified that there were a number of uncommon features about this application. Firstly, it came top-down through the appellant as the Prime Minister and Finance Minister directly to the CEO of KWAP (as opposed to the usual situation where potential borrowers would send in an application to KWAP to be processed upwards). Secondly, there were difficulties with the availability of supporting documents which were not forthcoming. And thirdly, the loan processing within KWAP was said to be rushed, though the approvals process was still followed.

[18] Eventually, the KWAP Investment Panel approved a financing of RM2 billion in 2011, and an additional RM2 billion in 2012 to SRC. The loans totaling RM4 billion were fully disbursed by KWAP to SRC.

[19] These loans by KWAP were principally granted on the strength of two government guarantees that the Cabinet approved to guarantee repayment of

the aggregate principal loan amount of RM4 billion by SRC to KWAP. The applications by SRC for the guarantees were made to and processed by the Ministry of Finance. The appellant's participation at the two relevant meetings of the Cabinet to approve the government guarantees of RM2 billion each is the basis of the charge of the use of position for gratification under s 23 of the MACC Act.

[20] On 24 December 2014, AmIslamic Bank via an email received a scanned copy of a written instruction signed by Nik Faisal and Dato' Suboh Yassin (PW42), who were directors and signatories of the SRC bank account at AmIslamic Bank. The instruction was for the transfer of RM40m from SRC's current account number 2112022010650 to be deposited into the current account of Gandingan Mentari Sdn Bhd ('GMSB') — account number 888100380694 maintained at the same bank.

[21] On the same day, GMSB issued a transfer instruction to AmIslamic Bank signed by the very same two signatories as in SRC account (as the two were also directors and signatories of GMSB) to effect the transfer of the same amount of RM40m into a current account bearing number 106810001108 at Affin Bank under the name of Ihsan Perdana Sdn Bhd ('IPSB').

[22] On 26 December 2014, of the RM40m received from GMSB, a sum of RM27m was transferred out of IPSB's account and credited into the appellant's personal AmIslamic Bank current account number 2112022011880 ('Account 880') which was also known and coded as the 'AmPrivate-1MY' account in AmBank.

[23] On the same date, IPSB made another transfer of RM5m out of its Affin Bank account, whereby this sum was credited into another of the appellant's current account bearing number 2112022011906 ('Account 906'), also maintained at AmIslamic Bank and was also known and coded as the 'Am-Private-My' account. Thus, at the close of business on 26 December 2014, RM32m was credited into the appellant's personal Account 880 and Account 906.

[24] On 29 December 2014, from the amount received from IPSB, on the instructions of the appellant to AmIslamic Bank dated 24 December 2014 (P277), AmIslamic Bank transferred RM27m from Account 880 to the account of Permai Binaraya Sdn Bhd ('PBSB') and also effected the transfer of RM5m from Account 906 to the account of Putra Perdana Construction Sdn Bhd ('PPC'). Both the accounts of PBSB and PPC were held at Maybank.

[25] On 5 February 2015 and 6 February 2015, two instruction letters signed by the same two signatories of SRC were issued to AmIslamic Bank to

effect the transfer of a sum of RM10m in two tranches of RM5m each to GMSB. The monies were then subsequently transferred by GMSB into IPSB's account.

[26] On 10 February 2015, IPSB effected a transfer of the RM10m into the appellant's Account 880. On the same day, Nik Faisal issued an instruction letter to AmIslamic Bank for the RM10m received from IPSB to be transferred from Account 880 to the appellant's Account 906.

[27] Nik Faisal, in addition to being the CEO and director as well as an authorised signatory of SRC had also been appointed by the appellant as the 'Authorised Personnel' or agent to operate all the appellant's personal accounts at AmIslamic Bank.

[28] Between December 2014 and February 2015, a total of 15 cheques were issued by the appellant; with one cheque from the AmIslamic Bank account number 2112022011898 ('Account 898') or also known and coded as the 'AmPrivate-Y1MY' account. The other 14 cheques were issued from the appellant's Account 906. The payees or recipients in relation to these 14 cheques testified in court and confirmed receipt of the cheques from the appellant.

[29] The inward transfers of the aggregate of RM42m from SRC into the appellant's Accounts 880 and 906, which were effected on 26 December 2014 and 10 February 2015 are the crux of the charges against the appellant.

[30] The appellant as the Prime Minister was during the material period vested with the authority to appoint and dismiss directors of SRC and to approve any amendments to the company's memorandum and articles of association (M&A). He was also SRC's Advisor Emeritus under the company's M&A, and as the Finance Minister was in the capacity as MOF lnc, the sole shareholder of SRC.

SUMMARY OF THE PROSECUTION CASE

The subject company and borrower — SRC

[31] The essence of the submission of the prosecution concerning SRC is the overarching control that the appellant had over SRC by virtue of MOF Inc being the shareholder of SRC (initially indirectly through 1MDB which MOF Inc wholly owns, and later directly), and by the express terms of the constitution of the company, ie the M&A, which provisions were contractually

binding on all the parties, including particularly, SRC and the appellant. The net result of this overarching control is that the appellant wielded supreme authority in the company.

[32] Firstly, article 67 of SRC's M&A conferred on the appellant, in his capacity as the Prime Minister, the power to appoint and remove members of the board of directors of SRC. Secondly, under article 116 of the M&A, no amendments to the M&A could be effected without the written approval of the Prime Minister, ie the appellant at the material time. The M&A was amended with the incorporation of a new article 117 which provided for the appointment of the Prime Minister, who again was the appellant at the material time, as the Advisor Emeritus of SRC. Thirdly, the powers of the advisor emeritus in the said article 117 compelled all major investment and strategic decisions of SRC to be first referred to the Advisor Emeritus for approval.

[33] Thus, other than the appointment of the first two directors at incorporation which is the usual requirement as specified in the M&A, additional appointments of the company's board members were subsequently effected pursuant to article 67 by the appellant as the Prime Minister, as evidenced in a letter signed by him dated 1 August 2011, which letter also specified the appointment of Nik Faisal as the chief executive officer ('CEO') of SRC.

The lender — KWAP

[34] The memorandum of 12 October 2010 (P357), concurred by the appellant as the Prime Minister, where the EPU agreed to give only RM20m as a start-up grant, instead of the SRC-proposed RM3.95 billion, also suggested that funding for SRC investments and operations should be sourced externally from banks and the financial markets. However, a few months later via letter dated 3 June 2011 signed off by its CEO, Nik Faisal, addressed to the appellant in his capacity as both the Prime Minister and Finance Minister, SRC proposed that financing for its investment activities be sourced from KWAP as a loan. The appellant agreed to the request by SRC for this funding of RM3.95 billion and noted on the letter 'YBhg Dato' Azian, Bersetuju dengan cadangan ini'. As stated earlier, this same letter was handed over to the CEO of KWAP then by the late Datuk Azlin Alias, who was the principal private secretary to the Prime Minister. This letter became the loan application to KWAP. It is the prosecution case that the political reality is that when the Prime Minister or Finance Minister stated that he agreed with the proposal, no other officer in the government or SRC would contradict him, and that it would be acted upon as was in this case.

[35] The proposal papers for the Investment Panel of KWAP to consider the loan application had initially recommended the approval of a loan of RM1 billion to SRC, because, among others, the company was a newly formed entity without any track record whatsoever in its proposed field of venture. The papers to the Investment Panel further highlighted that the very large loan amount of RM3.95 billion could, if approved, result in an overconcentration of risk to KWAP as a lender.

[36] Whilst the loan application was still in the process of being deliberated by the Investment Panel, which had at that juncture proposed the granting of a RM1 billion loan subject to verification of certain matters on SRC, the Chairman of the Investment Panel, Tan Sri Wan Abdul Aziz Wan Abdullah (PW45), who was also at the point in time, the Secretary General of the Ministry of Finance, the highest ranking civil servant in the MOF, was personally informed by the appellant to expedite the loan application approval process and even specifically told that a loan of RM2 billion would suffice. This request by the appellant was of course contrary to the RM1 billion which the Investment Panel was prepared to approve.

[37] On 19 July 2011, the request by the appellant was relayed to the special meeting of the Investment Panel (P372), as recorded in the minutes (P417).

The Investment Panel then agreed to approve the loan of RM2 billion to SRC, albeit subject to a government guarantee by the Government of Malaysia to secure the RM2 billion loan to be granted by KWAP to SRC.

The government guarantee — Ministry of Finance (MOF)

[38] The prosecution submitted that such actions by the appellant to the government officials in the Ministry of Finance ('MOF'), which he headed as the Finance Minister, constitute an instruction, and were in fact acted upon. To obtain the first government guarantee for the RM2 billion, Nik Faisal as the CEO of SRC then wrote a letter to the MOF to apply for the first government guarantee. On 12 August 2011, Nik Faisal met Maliami Hamad (PW44) the Secretary of the Loan Management, Financial Market and Actuary Division at the MOF, and later on 15 August 2011, he met Afidah Azwa Abdul Aziz (PW41), the officer in charge of the government guarantee application.

[39] PW41 testified that, at this meeting she was shown by Nik Faisal the SRC letter dated 3 June 2011 to the Prime Minister which bore the note/minute by the appellant addressed to the CEO of KWAP. PW41 had to expedite the preparation of the papers to be presented to the Cabinet meeting (*Majlis Jemaah Menteri*) ('MJM') because she had been instructed to submit the same to the Cabinet Division on the same day so that the papers would be

ready for approval by the Cabinet at its meeting on 17 August 2011, merely two days later. A

[40] The short notice for the preparation of the memorandum for the MJM was according to PW41 unprecedented, and neither was she able to gather adequate materials and information for inclusion into the papers for the MJM. PW41 testified that she considered the appellant's notation in the letter dated 3 June 2011 as a direction which she had to obey. She even gave evidence that she was told that SRC was the appellant's company, or in her words 'syarikat PM'. B C

[41] The prosecution contended that the extent of the involvement of the appellant at the MOF in other aspects concerning SRC is supported by the evidence given by other senior officials in the MOF which included Tan Sri Wan Abdul Aziz Wan Abdullah (PW45), the Secretary General of the MOF then, Dato' Mat Noor Nawi (PW44), a Deputy Secretary General, Datuk Fauziah Yaacob (PW53), another Deputy Secretary General, as well as PW43. D

[42] On 17 August 2011, the first government guarantee was approved at the Cabinet meeting chaired by the appellant. Subsequently on 26 August 2011, the government guarantee document was signed by the Second Finance Minister, Dato' Seri Ahmad Husni Mohamad Hanadzlah (PW56). PW56 had also testified and described the appellant's management style on matters related to 1MDB and SRC as 'autocratic' and that the appellant had told PW56 not to interfere in 1MDB and SRC matters. On 29 August 2011, the loan of RM2 billion was released by KWAP to SRC in four separate tranches of RM500m each. E F

[43] Some six months later, on 13 March 2012, SRC wrote another letter to KWAP (P383) to apply for additional financing of RM2 billion. This application was again approved by the Investment Panel of KWAP with the same condition that SRC must obtain a guarantee from the Government of Malaysia to secure the financing. G

[44] Even prior to the application for the additional RM2 billion loan by SRC in that letter of 13 March 2012 (P383), the appellant had at a Cabinet meeting held on 8 February 2012 tabled the Cabinet or Majlis Jemaah Menteri ('MJM') papers for approval of the second government guarantee for the second loan of RM2 billion. Following Cabinet's approval, the appellant himself later executed the second guarantee on behalf of the government. H I

[45] It is also the case of the prosecution that for this second loan, prior to the formalisation of the government guarantee, PW43 on behalf of MOF wrote a letter dated 28 March 2012 (P397) to KWAP suggesting the release of the

RM2 billion by KWAP before the government guarantee was released to KWAP by the MOF. PW43 agreed this was not normal practice and attributed the letter to an instruction by Tan Sri Wan Aziz (PW45), who as the Secretary General of the MOF was also the Chairman of KWAP and its Investment Panel. PW45 in turn testified that the said letter from MOF to KWAP was written following a request made by the appellant. Hence, the appellant had wanted the loan sum of RM2 billion to be disbursed even before the government guarantee was in place.

[46] On 28 March 2012, the second RM2 billion loan was released to SRC (P397) in a single draw down payment of RM2 billion. The government guarantee was issued later but the date of its signing was backdated to 27 March 2012 to coincide with the date of the facility agreement between KWAP and SRC. The prosecution contends that all these actions taken by the appellant demonstrates his 'hands-on' involvement in the two loan approvals by KWAP to SRC amounting to RM4 billion.

SRC funds into the appellant's account

[47] SRC had thus received RM4 billion in total from KWAP, in a form of the two loans of RM2 billion each. Evidence relevant to the charges in this case shows that various transactions had taken place involving the outward transfers of funds from the bank accounts of SRC.

[48] There were three transfers of funds of SRC which were directed into the appellant's bank accounts. It is the prosecution's case that the appellant caused the transfers of the RM42m from SRC to his personal bank accounts.

[49] First, on 24 December 2014, AmIslamic Bank via an email received a scanned copy of a written instruction which appeared to have been signed by Nik Faisal and Dato' Suboh Yassin, who were directors and signatories of SRC's bank accounts. The instruction was for the transfer of RM40m from SRC's current account number 2112022010650 ('Account 650') into the current account of GMSB's account number 888100380694 which was also maintained at the same bank. GMSB is a wholly owned subsidiary of SRC.

[50] On the very same date of 24 December 2014, GMSB on the authority of the same two signatories as in SRC wrote a transfer instruction to AmIslamic Bank signed by them (as the two were also signatories of GMSB) to effect the transfer of the same amount of RM40m into the current account of IPSB number 106810001108 maintained at Affin Bank Bhd. Later, on 26 December 2014, of the RM40m received from GMSB, a sum of RM27m was transferred out of IPSB's account into the appellant's current account

number 2112022011880 ('Account 880') which was specified as 'AmPrivate-1MY' account in AmIslamic Bank.

[51] Secondly, on the same date, IPSB made another transfer of RM5m out of its same Affin Bank account to be credited into another current account of the appellant, also maintained at AmIslamic Bank, but bearing the account number 2112022011906 ('Account 906'), and known as 'AmPrivate-MY' account.

[52] Thirdly, on 5 and 6 February 2015, two instruction letters signed by the same two signatories of SRC were issued instructing AmIslamic Bank to transfer a sum of RM10m in two tranches of RM5m each to GMSB, only for this RM10m to be thereafter transferred by GMSB into IPSB's account maintained at Affin Bank.

[53] On 10 February 2015, IPSB effected a transfer of RM10m into the appellant's Account 880. However, on the same day, Nik Faisal, who was lawfully appointed as the mandate holder of the appellant's bank accounts on terms and conditions imposed by the bank, issued an instruction letter to AmIslamic Bank for the RM10m received from IPSB to be onward transferred from the appellant's Account 880 to the appellant's Account 906.

[54] Thus, for the seven charges it seems clear, as submitted by the prosecution that at the close of business on 10 February 2015, some RM42m which belonged to SRC was credited into the appellant's personal accounts. It should also be mentioned that testimonies of witnesses reveal that the significant bulk of the RM4 billion drawn down to SRC by KWAP was almost immediately upon receipt transferred to accounts outside the country and some of which now appeared to have been frozen by the relevant authorities in Switzerland. Its present status was not made clear at trial, nor at the appeal before us. When queried by this court as to what happened to the RM4 billion KWAP loan to SRC, counsel for the appellant answered that no one knows.

Use of SRC funds by the appellant

[55] A significant transaction raised by the prosecution concerns the instructions made by the appellant himself by way of an instruction letter to AmIslamic Bank signed by the appellant dated 24 December 2014 (exh P277). As the account holder, the appellant instructed that RM27m be transferred from his Account 880 to the account of PBSB and another transfer of RM5m be made from his Account 906 to the account of Putra Perdana Construction Sdn Bhd ('PPC'). These were executed on 29 December 2014. Both are subsidiaries of Putrajaya Perdana Bhd ('PPB').

[56] Another aspect of outward transfers from the appellant's accounts would be the 15 personal cheques issued by the appellant himself between the period of late December 2014 and February 2015. Specifically, one was in respect of his AmIslamic Bank account number 2112022011898 ('Account 898') or also known as the 'AmPrivate-Y1My' account and the remaining 14 personal cheques were from his Account 906 where the payees or recipients in relation to these 14 cheques have all testified in court and confirmed receipt of the specified sums from the accused.

Short-term loan to SRC by the government

[57] The prosecution asserted that evidence show that sometime in 2015 it became clear that SRC was not able to repay the interest due to KWAP on the two loans totaling RM4 billion. MOF was informed by way of a letter issued by KWAP dated 28 August 2015 (P549) that if SRC defaulted in its repayment, an event of default would be declared.

[58] As the financing of the RM4 billion were guaranteed by the Malaysian Government, if a default notice was issued by KWAP, the whole sum of RM4 billion would have to be recalled and the government would be liable to pay up the entire loan and interest. To avoid being burdened by the huge recalled sum of RM4 billion having to be paid to KWAP in one lump sum within 30 days, the government via MOF decided to approve a short term loan to SRC, sufficient to repay the interest due to KWAP.

[59] Thus on 13 November 2015, the first short term loan of about RM100m was tabled and approved by the Cabinet in its meeting and MOF disbursed the loan directly to KWAP as repayment for amounts due to KWAP. Regardless, SRC continued to default in its instalment repayments which forced MOF to extend to SRC a second short term loan of RM250m in 2016; and for the same reason yet a further third short term loan of RM300m in 2017.

[60] The prosecution maintained that the second and third short term loans totaling approximately RM550m were agreed and sanctioned by the appellant himself in order to prevent KWAP from triggering an event of default, which would have caused the government of Malaysia, as the guarantor for both the government guarantees, to repay the RM4 billion loans and interests in full. The appellant therefore played a pivotal part in the payment out of approximately RM550m from the consolidated fund to service the interest payable on the RM4 billion previously borrowed by SRC from KWAP.

The nub of the charges

[61] The learned trial judge summarised the charges as follows:

The crux of the charges

[71] The prosecution therefore submitted, in essence, that the accused, as a public officer, namely as the Prime Minister and Finance Minister had used his office for gratification of RM42m by involving himself in the decision of the Government of Malaysia at the Cabinet meetings on 17 August 2011 and 8 February 2012 to provide SRC with Government guarantees to secure the financings of RM4 billion extended by KWAP to SRC. This is the first charge, and it is under s 23 of the MACC Act.

[72] The case of the prosecution on the CBT charges, three in total is that the accused as agent of SRC, namely as the Prime Minister, Finance Minister and advisor emeritus of the company was entrusted with dominion over properties belonging to SRC, and that in that capacity had committed criminal breach of trust of a total of RM42m thereof, in violation of s 409 of the Penal Code.

[73] In respect of the three money laundering charges under s 4(1)(b) of the AMLATFPUAA, it is alleged that the accused had committed money laundering by receiving a total of RM42m, which was the proceeds of unlawful activity, into his personal bank accounts.

The key contentions of the defence

[62] The appellant contended at the close of the prosecution case, as he contended before us as well, that the prosecution had failed to prove a prima facie case in respect of any of the seven charges. In particular the appellant advanced the argument that all the ingredients of the offences had not been established. These contentions of the appellant were summarised by the learned trial judge as follows:

The contentions of the defence in respect of the charge of the use of office for gratification

[75] In relation to the charge for the use of office for gratification under s 23 of the MACC Act, the principal arguments advanced by the defence may be stated as follows:

(a) the evidence relating to the involvement of the accused in the events between 2010 and 2012, leading up to and including the Cabinet's decisions to grant the Government guarantees to SRC, and KWAP extending the total of RM4 billion to SRC does not establish the existence of a corrupt arrangement which the accused can be said to be party to;

(b) the evidence does not establish any nexus between the accused's participation in matters connected with the said decisions of the Cabinet to grant the Government guarantees to SRC in the 2011 and 2012 and the RM42m that was transferred into his personal bank accounts in late 2014 and early 2015;

(c) the evidence leads to reasonable inferences that the transactions involving the RM42m were carried out without the knowledge and involvement of the accused and the impetus and purpose was unconnected to any act by him;

(d) the evidence also leads to a reasonable inference that the transactions involving the RM42m were done at the behest of others for their own ulterior purpose and benefit;

(e) the conclusion therefore is that the RM42m cannot be said to amount to 'gratification' as consideration for a use of office of position by the accused;

(f) the presumption under s 23(2) of the MACC Act does not apply because it has not been established that the accused had an 'interest' in SRC within the ambit of the mischief of the s 23 of the MACC Act offence. Even if the presumption applies, the evidence adduced has sufficiently rebutted the same;

(g) Section 23(4) of the MACC Act applies since the Prime Minister and the Finance Minister's participation in decisions taken in relation to MOF Inc-owned companies such as SRC are done as representatives of the Government and in the best interest of the Government. As such, s 23(1) of the MACC Act is of no application to such acts; and

(h) the presumption under s 50 of the MACC Act is of no application given that the necessary pre-condition of proving 'gratification' in the context of a corrupt arrangement has not been met, or that alternatively, the said presumption has been rebutted because the purpose of the RM42m was other than as a corrupt gratification connected to the Cabinet's decisions as referred to in the charge.

The contentions of the defence in respect of the three CBT charges

[76] As for the three CBT charges, the summary of the many arguments of the defence vis a vis the various ingredients of the offence is as follows:

Ingredient of 'agency' not established

(a) the capacities alleged in the three CBT charges (as the Prime Minister, Finance Minister and advisor emeritus) all do not fall within the definition of 'agent' as none of these were subservient capacities to SRC, whereby acts are done 'for and on behalf of' SRC qua principal;

(b) the contemporaneous documents relating to corporate governance regime of SRC do not reflect that any of these capacities fit within the traditional or purposive construction of an 'agent' for the purposes of s 409 of the Penal Code;

(c) there was no role played in the operational affairs of SRC by the Finance Minister as a person. The acts of MOF Inc or Menteri Kewangan Diperbadankan (MKD) as a corporation sole are separate and distinct from those of the Finance Minister. The acts of MOF Inc therefore are not the acts of the Finance Minister;

(d) further, in any event, the acts of MOF Inc are in the capacity of a shareholder of SRC. Shareholders are not agents of a company and owe no fiduciary duties to the company;

Ingredient of 'entrustment/dominion' not established

(e) the corporate governance regime as reflected in the contemporaneous evidence including the M&A of SRC, the various directors' circular resolutions, the minutes of the SRC Board meetings, the MOF Inc resolutions and the evidence of PW39 and PW42 establish that the Board of Directors was exclusively entrusted with dominion over the affairs and funds of SRC. The evidence also establishes that the directors did not act blindly in accordance with the instructions of either the Prime Minister, advisor emeritus, MOF Inc or the Finance Minister. At all material times, the Board of Directors was completely aware of and did in fact act in accordance with their absolute decision-making power;

(f) the evidence does not establish that the Prime Minister, advisor emeritus or the Finance Minister was entrusted with dominion over funds of SRC whether directly or indirectly;

(g) the testimony of PW39 and PW42 was inconsistent with the contemporaneous documentary evidence, particularly in relation to the exaggerated role of the advisor emeritus and MOF Inc which did not stand up to scrutiny in cross-examination and in fact did not fit with the evidence as a whole;

(h) sound legal reasoning also outlines that where supervision is given to a public officer over the affairs of a Government linked company, no case of entrustment or dominion can be made out;

(i) the evidence fell short of establishing that the RM42m depicted in the CBT charges were indeed funds belonging to SRC. In any event, the evidence did not establish any specific entrustment or dominion over the RM42m by the Prime Minister, advisor emeritus or Finance Minister;

Ingredient of 'misappropriation' not established

(j) the prosecution's attempted case on misappropriation is demolished as the evidence reveals that the funds of SRC were in fact disbursed out by 16 scanned copies of instruction letters which were not executed by PW42 who eventually denied knowledge of any financial transactions of SRC and GMSB;

(k) PW42's evidence on the purported appointment of IPSB as a CSR partner based on directions of the CEO was a fabrication as Nik Faisal was no longer the CEO of SRC at the material time (September 2014) and this was in fact known to all directors of SRC including PW39 who attended the relevant SRC Board meetings where the Board censured Nik Faisal for lying to the Board on the status of the audited financial statements of the company for the financial year ended 2013.

(l) PW49's testimony was incredible in light of contemporaneous conversations recorded in BBM messages (P578) and PW54's admissions thereon. Her excuses for not having kept what would have been critical evidence which would have protected her were incredulous given her qualifications and experience;

(m) there was a material gap in the prosecution's case as emails which would have shed light on how the funds in SRC's account were caused to be transferred out were not investigated despite the same being in possession of the MACC;

(n) no case of misappropriation under s 409 can be made out if the instruments by which funds in SRC's accounts were disbursed were forged or in any event unauthorised for being inconsistent with the applicable banking mandates;

(o) as admitted by the investigating officer there were other inferences on probable causes of the transactions of funds from SRC accounts. The evidence supported inferences that the same were caused by Jho Low and his cohorts as he ultimately benefited from the disbursement of over RM290m from the SRC account;

Element of 'dishonesty' not established

(p) the evidence supports an inference that the accused had no knowledge of the impugned transactions of funds out of SRC or into his accounts at the material time; and

(q) the evidence as a whole supports the inference therefore that the accused did not act dishonestly with regards to the transactions in the CBT charges or the utilisation of funds which were remitted into his personal accounts in 2014 and 2015.

The contentions of the defence in respect of the three money laundering charges

[77] In respect of its opposition to the three money laundering charges, the principal submissions of the defence, in summary, are as follows:

(a) the commission of the predicate offence has not been proven as the factum of 'unlawful activity' — the s 23 of the MACC Act charge and the three CBT charges for the purposes of the money laundering charges cannot be established;

(b) as such, the RM42m that is specified in the money laundering charges therefore cannot be proven to be the 'proceeds' derived or obtained directly or indirectly from the predicate offences that make up the unlawful activities;

(c) the mere fact that the RM42m was transacted into Accounts 880 and 906 does not prove the commission of the offence in the money laundering charges;

(d) the effect of a failure to prove the factum of 'unlawful activity' means that the mental element or mens rea element of the money laundering charges need not be considered and in any event has not been established; and

(e) the criteria in s 4(2) of AMLATFPUAA have no application as the predicate offence is one which the accused is alleged to have solely committed and that the 'proceeds' thereof are alleged to be laundered by the accused himself. The failure to prove the 'unlawful activity' itself negates the mens rea element.

Duty and function of the appellate court

[63] The duty and function of an appellate court when hearing and determining a criminal appeal is well laid down by high authority. In *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557; [1996] 3 CLJ 187 Gopal Sri Ram JCA (later FCJ) explained the principle in the following terms:

> In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.
>
> In *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction. The accused applied under the now repealed 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ, Malaya) said (at pp 39–40):
>
> > ... we gave leave because firstly we felt that there was no proper appraisal of *Shea Swarup v King-Emperor* AIR [1934] PC 227 and secondly purporting to follow Terrell Ag CJ in *R v Low Toh Cheng* [1941] MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.
>
> With respect, what Lord Russell of Killowen said in *Shea Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred 'the High Court should and will always give proper weight and consideration to such matters' as:
>
> (1) the views of the trial judge on the credibility of the witnesses;
>
> (2) the presumption of innocence in favour of the accused;
>
> (3) the right of the accused to the benefit of any doubt; and
>
> (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.
>
> Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd* [1955] AC 370 at p 375 where he quoted from Lord Thankerton's judgment in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 that:
>
> > Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
>
> The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused'. Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v Thomas*). On the facts of this case we do not think so.

A In *Wilayat Khan v State of Uttar Pradesh* AIR [1953] SC 122 at pp 123 and 125, Chandrasekhara Aiyar J, when delivering the judgment of the Supreme Court said:

> Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end; the second is that great weight should be attached to the view taken by the sessions judge before whom the trial was held and who had the opportunity of seeing and hearing the witnesses.
>
> ...
>
> Interference with an order of acquittal made by a judge who had the advantage of hearing the witnesses and observing their demeanour can only for compelling reasons and not on a nice balancing of probabilities and 14 improbabilities, and certainly not because a different view could be taken of the evidence or the facts.

D This principle was reiterated by Haidar Mohd Noor FCJ (later CJM) in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193; [2002] 3 CLJ 457, where the Federal Court noted:

E > It is an established principle that an appellate court should be slow to disturb the finding of facts of the lower court especially here where there are concurrent findings of facts by two courts namely the High Court and the Court of Appeal. Unless it can be shown that the finding of facts are not supported by the evidence or it is against the weight of evidence or that it is a perverse finding it is not for us to disagree.

F Though there are no concurrent findings, and the findings on appeal are only that of the High Court, nevertheless, the principle is that when it comes to findings of facts by the trial judge, the appellate court would be slow to disturb those findings, unless the findings are perverse, unsupported by evidence, or go against the weight and grain of evidence. G

In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, Gopal Sri Ram JCA (later FCJ) speaking for the Court of Appeal summarised the principle and said that it is not the place of the appellate court to make its own findings of fact: H

> Now, it is settled law that it is no part of the function of an appellate court in a criminal case or indeed any case — to make its own findings of fact. That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lack the audio-visual advantage enjoyed by the trial court. I

Then in *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875; [2014] 7 CLJ 897 the Court of Appeal speaking through Mohd Zawawi Salleh JCA (now FCJ) held:

[4] We have heard learned counsel for the appellants and learned deputy public prosecutor ('DPP') at some length. We have also scrutinised the records available before us. We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions.

Where:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion,

then an appellate court will intervene to rectify that error so that injustice is not occasioned see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] 1 LNS 1416 (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

These pronouncements of the law are binding precedents for this court to follow. Though the principle is that the appellate court should be slow to disturb or interfere with the factual findings of the trial court, that does not, however, fetter the appellate court from scrutinising the findings and the circumstances leading to the findings of fact to ascertain if there are any compelling reasons for disagreeing with those findings. This rider to the general principle was reaffirmed by the Federal Court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and another appeal* [2004] 3 MLJ 405; [2004] 3 CLJ 737, in the following words:

Clearly, an appellate court does not and should not put a brake and not going any further the moment it sees that the trial judge says that that is his finding of facts. It should go further and examine the evidence and the circumstances under which that finding is made to see whether, to borrow the words of HT Ong (CJ Malaya) in *Herchun Singh*'s case 'there are substantial and compelling reasons for disagreeing with the finding'. Otherwise, no judgment would ever be reversed on question of fact and the provision of s 87 of the CJA 1964 that an appeal may lie not only on a question of law but also on a question of fact or on a question of mixed fact and law would be meaningless.

A And in the final analysis, the duty of the appellate court hearing a criminal appeal is to ascertain if the conviction is right and that it is safe for the conviction to stand. This was reaffirmed by the Court of Appeal in *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409; [2005] 1 CLJ 389, where the court held that in a criminal appeal:

B

> Unlike civil appeals, where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe. See *Mohammad Hussain v Emperor* AIR 1945 Nag 441; *Zahari bin Yeop Baai v Public Prosecutor* [1980] 1 MLJ 160; [1977] 1 LNS 162.

C

Based on the principles stated in the cases mentioned above, it can be concluded that the court hearing the appeal is ordinarily not to disturb findings
D of fact, however it is obliged to interfere with a trial court's factual findings if it is found that the trial court had misdirected itself in some way, or if there are substantial and compelling reasons for disagreeing with the findings, or if the finding of fact is plainly wrong. It is also a well-established principle that in exercising its appellate jurisdiction, this court is not constrained from
E re-evaluating the whole of the evidence that has been presented at the prosecution and defence stages. In re-evaluating the whole of the evidence, the court has to evaluate the defence presented by the appellant in totality with the evidence adduced through the prosecution witnesses.

F We have taken heed of these principles in considering the petition of appeal and in particular the issues raised in submissions by the appellant's learned counsel and the learned deputy, and were guided by the principle that in a criminal appeal the duty of the appellate court is to consider whether the conviction is right and safe.

G

The law on prima facie finding at the close of prosecution case

[64] The appellant contends that the prosecution had failed to establish a prima facie case in respect of all seven charges, and that the appellant ought not
H to have been called to enter his defence. The starting point for the law on prima facie ruling at the close of the case for the prosecution is found in s 180 of the Criminal Procedure Code which provides:

> 180 Procedure after conclusion of case for prosecution
>
> I (1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused.
>
> (2) If the court finds that the prosecution has not made out a prima facie case against the accused, the court shall record an order of acquittal.

(3) If the court finds that a prima facie case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[65] The law is well settled by the Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85, as follows:

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can only be overthrown by evidence in rebuttal ... The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a prima facie case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

[66] Shortly thereafter, the Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 reiterated the applicable principles in the court determining whether a prima facie case has been made out at the close of the prosecution case in the following terms:

> [15] For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:
>
> (i) at the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all

reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a prima facie case has been made out and the defence should be called. If the answer is 'No' then, a prima facie case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v Public Prosecutor* [1963] 1 MLJ 263; [1963] 1 LNS 82.

The trial judge's oral pronouncement on prima facie case

[67] The prosecution's case began on 3 April 2019 and went on for 57 days with 57 prosecution witnesses. The prosecution closed its case on 27 August 2019. The learned trial judge directed written submissions to be filed on whether the prosecution had proved a prima facie case for all the charges. The trial court heard further oral submissions on the issue. On 11 November 2019, the learned trial judge ruled that the prosecution had established a prima facie case for all seven charges pursuant to s 180(3) of the CPC, and in doing so read out a summary of the key findings in that regard. This is found in the notes of proceedings at pp 6294–6310 of *Rekod Rayuan Jld* 2(32).

[68] In that oral ruling, the learned trial judge stated:

> The duty of this court at the end of the prosecution's case is stated clearly in s 180(3), the court must consider whether the prosecution has made out a prima facie case against the accused and in this case now before this court, in respect to the seven charges against the accused. Case laws have ruled that this means that this court must at this stage subject the totality of the evidence of the prosecution to a positive and maximum evaluation of the credibility and reliability of all the evidence adduced in order to determine whether the element of the offences as framed in the charges have been established. Having done exactly that I will now deliver a summary of my key findings of whether or not there is a prima facie case in respect of the seven charges.

In concluding that a prima facie case had been made out by the prosecution, the learned trial judge noted:

> In conclusion, in light of the following summary, upon the maximum evaluation of all the evidence adduced before me at the end of the prosecution stage involving an assessment of the credibility of the prosecution's witnesses and the drawing of inferences submitted by the prosecution evidence as tested in cross-examination, in

my judgment the prosecution has successfully adduced credible evidence proving each and every essential ingredient of the offences of abuse of position for gratification, CBT and money-laundering as framed in the charges, in relation to any or which if unrebutted or unexplained would warrant a conviction. The prima facie case has therefore been made out against the accused in the span of each of the single charge of abuse of position for gratification, the three CBT charges, the three money-laundering charges within the meaning of s 180 of the Criminal Procedure Code as such I now call on the accused to enter defence in respect of all the seven charges.

[69] After the learned trial made his ruling, learned counsel for the appellant enquired if the court would provide a written judgment on that ruling so that the defence can be guided by it when putting forward their case. The learned trial judge had responded to that enquiry by stating his oral pronouncement is the ruling at the end of the prosecution case and that it would be available in the court's CRT system.

[70] The defence case commenced on 3 January 2019 and closed on 11 March 2020 after the examination of 19 defence witnesses including the appellant. After having considered the written and oral submissions of parties, the learned trial judge delivered his judgment on 28 July 2020 convicting the appellant on seven charges. Thereafter, the written grounds of judgment was published and made available. The learned trial judge's grounds for the finding of a prima facie case on all charges commences at para 78 and ends at para 1230 of the grounds of judgment.

[71] Learned counsel for the appellant submits before us that in the written grounds of judgment there are material additions to the learned trial judge's oral summary of findings on prima facie case delivered at the close of prosecution case. According to learned counsel for the appellant, these added findings directly co-relate to the evidence and issues which were raised by the defence in their written submissions filed at the end of their case, and they include:

(a) on the s 23(1) of the MACC Act charge:

(i) added findings of fact and inferences on the ingredients of the offence;

(ii) references to the evidence not cited in the oral ruling;

(iii) findings of law based on case law;

(iv) changes in position on evidence;

(v) findings on issues raised in submissions at close of prosecution which were not addressed in the oral ruling;

(vi) findings on issues raised in the defence case;

(vii) findings made by reference to documentary evidence and oral testimony not contained in the oral ruling;

(viii) new grounds on which ingredients of the s 23(1) of the MACC Act offence made out and/or presumption under s 23(2) of the MACC applied; and

(ix) new findings of facts and inferences.

(b) on the s 409 of the PC charges:

(i) added findings of fact and inferences on the ingredients of the offence;

(ii) references to the evidence not cited in the oral ruling;

(iii) corrections to remove reference to testimony of PW42 which was cited in the oral ruling;

(iv) findings of law based on case law;

(v) findings made with reference to ID499 which was not even marked into evidence;

(vi) findings made on documentary and oral testimony not cited in the oral ruling;

(vii) reference to testimony of PW42 and explanations on the same;

(viii) new findings to justify findings of entrustment;

(ix) new findings to justify finding of misappropriation;

(x) completely new finding that misappropriation also proven by 'conversion to own use';

(xi) findings negating defences;

(xii) findings on matters which were left out of the oral ruling and not touched on in the defence case as a result;

(xiii) change in findings of knowledge leading to dishonesty;

(xiv) application of presumption under s 402B of the Penal Code when no such presumption was invoked in the oral ruling;

(xv) added new findings on issues not addressed in the oral ruling;

(xvi) findings on issues raised in submissions at close of prosecution which were not addressed in the oral ruling and therefore deemed not material;

(xvii) findings on issues raised in the defence case;

(xviii) findings made by reference to documentary evidence and oral testimony not contained in the oral ruling;

(xix) new findings of facts and inferences; and

(xx) reference to the appellant's s 62 defence statement which was only tendered during the defence case, and thus not available at close of prosecution case;

(c) on the s 4(1) of the AMLA charges:

(i) change in findings of law between need to prove predicate offence and need to only prove that RM42m were proceeds of any unlawful activity;

(ii) change in finding that AMLA offence was made out based only on CBT offence in the oral ruling but at the close of defence case reference is made to both CBT and the s 23 of the MACC Act offences;

(iii) added findings of fact and inferences on the ingredients of the offence;

(iv) references to evidence not cited in the oral ruling;

(v) findings of law based on case law;

(vi) findings made on documentary and oral testimony not cited in the oral ruling;

(vii) new grounds to justify inferences of knowledge and/or wilful blindness;

(viii) findings negating defences;

(ix) added new findings on issues not addressed in the oral ruling;

(x) findings on issues raised in the defence case;

(xi) findings made by reference to documentary evidence and oral testimony not contained in the oral ruling; and

(xii) new findings of facts and inferences.

[72] Additionally, learned counsel for the appellant contends that the decision on the admissibility of documents in paras 1070–1175 of the grounds of judgment was yet to be made at the close of the prosecution case and that issue of admissibility of these documents were also addressed at close of prosecution case. The findings by the learned trial judge that these documents were inadmissible under the Evidence Act 1950 but admissible by operation of the non-obstante provisions in the MACC Act and the AMLA Act was never made known before the defence case.

[73] Learned counsel for the appellant further submits that the added findings in the grounds of judgment were not findings made by the learned trial judge at the close of the prosecution case under s 180(3) of the CPC, and that they were made only after the case had concluded. As such, learned counsel for the appellant argues that the additional findings in the grounds of judgment:

A (a) seek to supplement what was supposed to already be the findings made by the learned trial judge upon undertaking a maximum evaluation of the evidence adduced in the prosecution's case; and

(b) that they cannot be considered as part of the determination which
B formed the basis on which the trial court found a prima facie case and ought to be disregarded.

[74] We accept the learned counsel's contention that the prosecution must stand or fall on the evidence as it stood at the close of the prosecution case and
C that the prosecution cannot seek to fill any lacunae or improve or supplement its case from whatever that may be elicited from the defence. The crown case rests at the close of the prosecution. See *Public Prosecutor v R Balasubramaniam* [1948] 1 MLJ 119. This principle was also stated in *Public Prosecutor v Lim Teong Seng and 2 others* [1946] 1 MLJ 108, where Laville J
D observed:

> In my view, the basis of this direction in ss 173(f), 180 and 190 is twofold. Firstly, that the onus is on the prosecution and never shifts to prove its case. Secondly, that the circumstances of each of these 3 forms of trial are the same. The presiding officer
E is sitting not only as a judge but as a jury. If therefore at the close of the prosecution he as a jury comes to the conclusion, not that there is no evidence, but that the evidence produced is not strong enough to warrant a conviction, and only evidence beyond all reasonable doubt is of that nature, he is not by the spirit of English law entitled to say: 'I am doubtful of this evidence but let us see if it can be
F supplemented and improved by what can be elicited from the defence'. *The prosecution who have to prove their case beyond all reasonable doubt have produced all the evidence they have, and it is on this evidence the conviction if any must rest, even if accused calls evidence. What the prosecution can elicit for its view from them is either supplementary or redundant, or goes to lessen the credibility of the defence evidence. It cannot be the basis of a conviction.* If therefore at the close of the prosecution the court
G is of opinion that on that evidence it cannot, as a jury, hold the allegations proved beyond all reasonable doubt, there is nothing left for it to do but to acquit the accused. This view point is set out by the sections cited above. (Emphasis added.)

[75] In *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1, Edgar
H Joseph FCJ in his judgment justified the undertaking of a maximum evaluation of evidence at the close of prosecution case to determine whether a prima facie case had been made out or conversely the accused has no case to answer so as to ensure that the prosecution's case is complete prior to an accused being called on to testify in his defense. The learned judge said:

I

> One of the main objects of a submission of no case is to protect an accused against a prosecutor who has failed to make out a case and hopes to repair deficiencies in his own case by cross-examination of the accused and witnesses called on his behalf. Therefore, the greater the burden on the prosecution to establish a case the greater the protection offered to the accused.

[76] There are however exceptions to this general rule where the trial court has a discretion to allow evidence in rebuttal in very special or exceptional circumstances. See *Shaw v R* (1952) 85 CLR 365, the principle of which was applied by Augustine Paul J (as he then was) in *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649.

[77] However, in the present case we do not find any attempt by the prosecution to adduce further evidence or rebuttal evidence during the defence case, nor is there any attempt by the prosecution to supplement or close any gap in their case by reference to the evidence adduced by the defence. The appellant's main complaint is that the learned trial judge in the final judgment did not keep to his oral summary of findings made and pronounced at the end of the prosecution case on the issue of prima facie case. We do not find any merit in that contention.

[78] In *Yusof bin Omar v Pendakwa Raya* [2001] 2 MLJ 209; [2001] 3 CLJ 122, the sessions court judge had delivered an oral ruling at the close of the prosecution with findings of a prima facie case. The oral ruling was recorded in the notes of proceedings. In the written grounds of judgment delivered at the end of the defence case, the earlier oral ruling was reproduced as the grounds upon which a prima facie case had been found. On appeal to the High Court it was contended that in the written judgment the sessions court judge had looked at additional factors when writing the final written judgment. Hence, it was submitted that there were two judgments. The Court of Appeal in affirming the decision of the High Court in dismissing the appellant's contention said:

> Berdasarkan apa yang dilakukan oleh hakim mahkamah sesyen itu, peguam perayu dalam hujah bertulisnya yang diberikan kepada mahkamah ini menghujahkan bahawa hakim Mahkamah Tinggi yang mendengar rayuan daripada mahkamah sesyen itu silap apabila beliau memutuskan bahawa hakim mahkamah sesyen tidak menulis dua alasan penghakiman. Peguam perayu itu menghujahkan bahawa hakim mahkamah sesyen telah menulis dua alasan penghakiman memberi sebab-sebab mengapa beliau memanggil perayu membela diri. Beliau meminta mahkamah ini supaya tidak mengambil kira 'alasan penghakiman kedua' itu.
>
> Tetapi, semasa berhujah di mahkamah ini, setelah disoal oleh kami, beliau mengatakan:
>
> > The point is not so much about two judgments. But in the final judgment he (*hakim mahkamah sesyen — ditambah*) looked at the revealed statement.
>
> Ini nampak seolah-olah bahawa soal terdapat satu atau dua alasan penghakiman itu telah digugurkan atau sekurang-kurangnya tidaklah ditekankan sangat.
>
> Walau bagaimanapun eloklah kami menyentuh mengenainya.
>
> Hujah mengenai dua penghakiman ini telah dibangkitkan di Mahkamah Tinggi semasa rayuan perayu didengar di mahkamah itu dulu. Hakim Mahkamah Tinggi

A yang bijaksana itu, dalam penghakimannya berkata:

> On the issue of admissibility of the notes of proceeding (exh P2) the learned judge did not deliberate any further than to state that he had dealt with the issue in his oral judgment delivered at the close of the prosecution case. I am of the view therefore that the learned Judge having delivered an oral judgment read out from a written text at the end of the prosecution case and subsequently adopt the oral judgment in his written judgment at the end of the defence case, as is the case here, there are no two judgments. Similarly where the learned Judge delivered an oral judgment at the end of the prosecution case on the issue whether the Appellant's statements to the ACA officers be produced in whole or in part and subsequently did not deliberate further on the same issue at the end of the defence case, I hold that there are no two judgments on the issue. *The learned judge had not orally delivered a written judgment of decision which he subsequently supplemented or amplified in another written grounds of decision which according to Rigby J in Loh Kwang Seang v Public Prosecutor* [1960] 1 MLJ 271; [1960] 1 LNS 64 *is not permissible nor did he alter or review the same in contravention of s 278 of the Criminal Procedure Code.*

Kami bersetuju dengan pandangan hakim yang bijaksana itu.

...

Daripada peruntukan-peruntukan ini adalah jelas bahawa di akhir kes pendakwaan jika hakim bicara (perkataan 'hakim' di sini termasuklah majistret, hakim mahkamah sesyen dan hakim mahkamah tinggi) mendapati bahawa terdapat satu kes prima facie, beliau hendaklah memanggil tertuduh membela diri. Beliau tidak perlu memberi apa-apa alasan mengenai keputusannya itu. Demikian juga di akhir perbicaraan kes itu. Jika beliau dapati bahawa pendakwaan telah membuktikan kesnya melampaui keraguan yang munasabah, beliau hendaklah membuat keputusan bahawa tertuduh bersalah, mensabitkannya dan menjatuhkan hukuman. Alasan-alasan juga tidak perlu diberi. Cuma, jika ada rayuan, barulah beliau dikehendaki menyediakan dan menandatangani alasan-alasan keputusannya, yang biasanya dipanggil 'alasan penghakiman'.

Tetapi, dalam suatu kes yang perbicaraannya memakan masa yang panjang, di mana banyak persoalan undang-undang dibangkitkan, hakim-hakim bicara kerap kali memberi alasan-alasannya secara ringkas mengenai keputusannya. Ini adalah satu amalan yang baik. Jika tidak mungkin pihak-pihak berkenaan tertanya-tanya apakah alasan beliau berbuat demikian. Mungkin juga ada pihak yang beranggapan bahawa beliau telah tidak menimbang sewajarnya hujahnya atau telah tersalah arah.

Dalam suatu kes yang rumit, hakim-hakim itu mungkin menulis alasan-alasan itu secara ringkas dan membacanya. Itulah yang dilakukan dalam kes ini. Tetapi, dalam kes ini alasan-alasan itu dicatat dalam nota keterangan. Kami percaya ini dilakukan dengan niat yang baik untuk mengelak tuduhan bahawa nota keterangan itu tidak lengkap.

Demikian juga di akhir perbicaraan, semasa memberi keputusannya, kerapkali hakim-hakim bicara memberi alasan-alasan ringkas mengapa mereka membuat keputusan seperti yang dibuatnya. Ini juga dilakukan dengan tujuan yang sama.

Dalam kes ini, disebabkan panjang dan rumitnya kes itu, hakim mahkamah sesyen itu telah menangguhkan kes itu selama 18 hari selepas mendengar hujah akhir kedua-dua belah pihak untuk memberi keputusannya. Dalam masa 18 hari itu beliau telah menulis alasan penghakimannya sepanjang 49 muka surat di samping, kami percaya, membicarakan kes-kes lain. Bahawa beliau boleh berbuat demikian patutlah dipuji. Alasan penghakiman bertulis yang lengkap inilah yang dibaca dalam mahkamah semasa beliau memberi keputusan di akhir perbicaraan itu. Dan alasan inilah alas an penghakiman yang ditandatangani seperti yang dikehendaki oleh s 307(3) KAJ.

Kami berpendapat bahawa bukanlah 'salah' ('wrong') atau salah aturan bagi hakim mahkamah sesyen itu memberi alasan-alasan mengapa beliau memanggil perayu membela diri. Malah itu adalah satu amalan yang baik. Demikian juga jika seseorang hakim bicara itu berbuat demikian semasa memberi keputusan di akhir kes, jika beliau tidak sempat menulis alasan penghakiman lengkap di peringkat itu. Kami juga berpendpat adalah tidak 'salah' atau salah aturan jika hakim-hakim bicara membuat catatan dan membacanya semasa memberi alasan-alasan mengapa mereka memanggil tertuduh membela diri atau sebaliknya atau mendapatinya bersalah atau sebaliknya. Ini untuk mengelak kesilapan yang mungkin berlaku. Kami juga berpendapat bahawa adalah tidak 'salah' atau salah aturan jika alasan-alasan itu kemudian ditaip sebagai sebahagian daripada nota keterangan. Bahawa ianya ditulis, dibaca dan direkodkan tidaklah menjadikannya suatu alasan penghakiman yang ditandatangani di bawah s 307(3) KAJ. Maka soal 'dua alasan penghakiman' tidak timbul.

[79] The principle enunciated by this court in the above case is that, whilst there is no duty on the trial judge to give reasons for the ruling on prima facie case at the close of the prosecution case, or even at the end of defence case when the final verdict is delivered, it is however encouraged.

[80] Similarly, in the Singapore case of *Goh Lai Wak v Public Prosecutor* [1994] 1 SLR 748; [1994] SGCA 32, the Court of Appeal held that:

There cannot be any objection to a judge providing briefly at the conclusion of a trial an outline of the issues before him and the evidence on them, and to indicate briefly, without reasons, his findings on them. In such circumstances, there should be no objection if subsequent written grounds of decision are delivered in which the evidence is fully reviewed and the judge's detailed reasons or grounds for his findings are comprehensively recorded.

[81] In the present case, though the learned trial judge gave some reasons for his findings, he had specifically caveated that by stating that his pronouncement was just a summary of the key findings. This clearly indicates that if required at the end of the defence case, he would give a more comprehensive account of his findings on the prima facie case. See: *Public Prosecutor v Dato' Rahmat bin Asri & Anor* [1992] MLJU 7. The learned trial judge did not supplement nor close any gap in his earlier oral ruling. He had

merely given a comprehensive and more detail reasoning for his finding that the prosecution had proved a prima facie case for allseven charges.

[82] In *Mohamad bin Ahmad v Public Prosecutor* [2015] MLJU 2239, the Court of Appeal had observed:

> Failure to state grounds for holding the prosecution had established a prima facie case
>
> [23] In so far as the requirement for the learned trial judge to prepare grounds of judgment in finding a prima facie case and in calling for the defence, there is no statutory requirement to do so. In our view, the absence of the words 'finding of a prima facie case' in the judgment has not prejudiced the appellant. What is more important, at the close of the case for the prosecution is for the appellant to know what is it that he has to answer in his defence. It is not the case here that the appellant was prejudiced for not being able to put up his defence properly (see *Yap You Jee v Public Prosecutor and other appeals* [2015] 5 MLJ 334; [2015] 7 CLJ 897). Therefore we find this ground is without merit.

[83] The principle that there was no requirement in law for a trial judge to record his reasons for finding a prima facie case was confirmed by the Federal Court in *Yap Chai Chai & Anor v Public Prosecutor* [1973] 1 MLJ 219 where in an appeal to the Federal Court against conviction on a murder charge, it was argued that it was mandatory for the trial judge, at the close of the prosecution's case, to enter on the record, his opinion that there was a case to answer and that his failure to do so rendered the trial a nullity. In dismissing the appeal, Ong CJ said at p 221:

> Leaving aside for the moment the second appellant's statement, we are clearly of opinion that the facts which were indisputable had established a clear prima facie case, and that the learned trial judge would have been wrong to withdraw the case at that stage from the jury. We do not think that the provisions of s 204(2) of the Criminal Procedure Code (SS Cap 21) had any application, nor do we agree with the contention of Datuk SP Seenivasagam that it was mandatory for the judge at the close of the prosecution to enter on the record his opinion that there was a case to answer — the failure to do so rendering the trial a nullity. As authority for this proposition two cases were cited to us, being the judgments delivered by Willan CJ in *Ng Peng Choon v Public Prosecutor* [1947] MLJ 87 and *Govindasamy v Public Prosecutor* [1949] MLJ 101. In our opinion the provisions relating to trials with assessors, as in those cases, have no application to jury trials; in any event, we must say, with all respect, that we unanimously disagree with the learned Chief Justice. What is always of paramount importance in the administration of criminal justice is a fair trial — not such excessive legalism as to give the ordinary meaning of words the sacrosancity of a ritual.

[84] This was reiterated by the then Supreme Court in *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 where Mohamed Azmi SCJ in delivering the unanimous decision of the court held:

In our opinion, there is also no statutory provision requiring a judge sitting alone to expressly record his reason before calling the accused to enter his defence or to state his findings on the credibility of main prosecution witnesses. But, as a matter of practice, where there is a particular reason for doing so, such as where a submission to answer has been made in a complex case, or where the accused is called to enter a defence on a lesser or alternative charge, judges do sometimes give their reasons. In uncomplicated cases, such as in the instant appeal, it is not obligatory or even necessary to do so. By calling an accused to enter his defence, it should be assumed that the trial judge must on evaluation of the evidence, have been satisfied that the prosecution had, at that stage of the trial, established a prima facie case which, if unrebutted, would warrant a conviction of the accused. To arrive at such a conclusion, it is inherent that the judge must consider all the evidence adduced by the prosecution as tested in cross-examination, on a prima facie basis. In this appeal, the establishment of a prima facie case of unlawful possession of a firearm under s 57 of the Act was so obvious, even to the defence counsel, that it became academic and unnecessary for the court to consider an order of acquittal under s 180 of the Code. Thus, when the learned judge called for the defence in the present case, he must have been satisfied that there was a prima facie case to answer which, if unrebutted, would warrant a conviction, and it was not mandatory for him to record the reasons for his satisfaction, even if there had been no concession made by the defence counsel. However, whether the judge was actually correct in law in calling for the defence was of course open for review on appeal to this court. Be that as it may, we hold the view that mere failure or omission on the part of a trial judge to record his grounds for his findings on credibility of witnesses at that stage of the trial is not sufficient by itself for allowing an appeal, particularly when considered in the light of the provisions of ss 60 and 72 of the Courts of Judicature Act 1964 read together with s 167 of the Evidence Act 1950 and s 422 of the Code.

We must however, stress that notwithstanding the concession made by the defence counsel at the trial, it was still open and indeed incumbent upon us, at this appellate stage, to examine the appeal record and to satisfy ourselves that there was in fact and in law, a case for the appellant to answer. Having done so, we were of the view that the evidence adduced by the prosecution as contained in the appeal record did in fact and in law disclose a prima facie case for the accused to answer the charge which if unrebutted would warrant a conviction.

[85] The principle is very clear, there is no statutory requirement on the part of the trial judge to give reasons for his finding on prima facie case at the close of the prosecution case. The trial judge can simply say that he has found a prima facie case proved and call the accused to enter his defence. What is important is that the accused knows what he has to answer, and that would be from the charge and the evidence of the prosecution establishing the ingredients of the offence. However, there are some limited circumstances where the trial judge would be required to make certain definitive findings at the close of prosecution, for instance in a charge of drug trafficking, the trial judge would have to make definitive findings on the element of possession and trafficking, whether prosecution's case is established by direct evidence or by invoking the statutory presumption. This is important as the accused has different burden to

discharge if the statutory presumption is applied. See *Ho Yee Onn v Public Prosecutor* [2020] 2 MLJ 789 (CA); and *Mohamad Hanafi bin Mohamad Hashim lwn Pendakwa Raya* [2016] 3 MLJ 723 (CA).

[86] The fact of the matter is that, by the oral ruling the appellant was not prejudiced. The appellant knew very well what the case against him was, he was not prejudiced for not being able to put up his defence properly. There was concerted and focused attack on every aspect of the prosecution's case, and on each and every element of the seven offences, and the prosecution's evidence in respect of that was vigorously challenged.

[87] As to the contents of the documents that were yet to be admitted as evidence during the prosecution case, the witnesses for the prosecution were extensively cross-examined on these documents by counsel for the appellant, they were ultimately admitted as evidence by the trial judge after the appellant had himself confirmed his signature on the documents, and also by virtue of the non-obstante provision in the MACC Act. Again, we do not find the appellant being prejudiced by the reference to these documents by the learned trial judge in his grounds of judgment when discussing his findings on prima facie case.

[88] In the premise, we do not find any misdirection on the part of the learned trial judge on the assessment of the prima facie case, nor is there any enlargement of that finding as contended by learned counsel for the appellant. The learned trial judge had not supplemented nor improved on the grounds in which the prima facie findings were made. The oral ruling was accompanied by a summary of the key findings, which by implication means that the learned trial judge when ultimately writing his judgment would have a more comprehensive account of his reasoning and findings. The appellant has not been asked to answer matters beyond the findings in the oral ruling, nor has it infringed the appellant's constitutional right to a fair trial.

[89] What is important is that the evidence of the prosecution must show a prima facie case for each and every offence the appellant is charged with. Notwithstanding the finding made by the learned trial judge 'it was still open and indeed incumbent upon us, at this appellate stage, to examine the appeal record and to satisfy ourselves that there was in fact and in law, a case for the appellant to answer'. And that is what we propose to do now.

[90] The learned trial judge had referred to s 180 of the Criminal Procedure Code as well as the two leading Federal Courts cases of *Balachandran* and *Mohd Radzi bin Abu Bakar* in his judgment. Further, the learned trial judge had alluded to the core principle from these two case authorities to the effect that the entirety of the evidence led by the prosecution would have to be maximally

evaluated by the trial judge and determine whether the evidence adduced is sufficient to convict the appellant if he had chosen to remain silent after the prima facie finding. We find that the learned trial judge had applied the law correctly in making his evaluation of the prosecution case to determine if the prima facie threshold has been established for all the charges.

[91] We shall now consider the arguments raised by the appellant that the assessment, consideration and conclusion of the learned trial judge in respect of all the elements necessary to prove the charges were erroneous.

We shall take the arguments raised in the following order of prima facie finding on:

(a) the charge under s 23 of the MACC Act;

(b) the charges under s 409 of the Penal Code; and

(c) the charges under s 4(1)(b) of the AMLA Act.

The charge under s 23 of the MACC Act

[92] There is one charge under s 23 of the MACC Act which states that the appellant, between 17 August 2011 and 8 February 2012, as a public officer, had used his office for gratification of RM42m by involving himself in the decision of the government to provide guarantees for the financing of RM4 billion made available by KWAP to SRC.

Section 23(1) of the MACC Act reads:

> (1) Any officer of a public body who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.
>
> (2) For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for any gratification, whether for himself, his relative or associate, when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.

The two main elements that must be proved for an offence under s 23(1) are first, the accused was an officer of a public body, and second, the accused had used either his office or position for gratification for himself or his relative or associate. However, in the present case the charge is framed such that the appellant is said to have used his office or position for gratification for himself.

A The first element — Officer of a public body

[93] Section 3 of the MACC Act defines an 'officer of a public body' as follows:

B > 'officer of a public body' means any person who is a member, an officer, an employee or a servant of a public body, and includes a *member of the administration*, *a member of Parliament*, a member of a State Legislative Assembly, a judge of the High Court, Court of Appeal or Federal Court, and any *person receiving any remuneration from public funds*, and, where the public body is a corporation sole, includes the person who is incorporated as such.

C

[94] When the evidence is tested against this definition in s 3, we agree with the finding of the learned trial judge that the appellant is clearly an officer of a public body on three separate counts. First, as a member of the administration, D secondly as a Member of Parliament and thirdly as a person receiving remuneration from public funds. There is overwhelming evidence establishing the fact that the appellant was at the material time the Prime Minister, Finance Minister, Member of Parliament, and was receiving remuneration from public funds. The learned trial judge had considered at length the evidence in this E regard and found that the first element of the offence had been proved and concluded as follows:

> [103] Accordingly, the prosecution has proven the first element of the charge under s 23 of the MACC Act against the accused, in that the accused was at the material F time an officer of a public body within the meaning ascribed to it under s 3 of the MACC Act, by virtue of the fact that he was not only a member of the administration, but also a Member of Parliament, as well as a person receiving remuneration from public funds, when any one of the three will have already fulfilled the definition of an officer of a public body.
>
> G [104] For the record, in fact the defence also does not challenge this position and accepts that the accused was an officer of a public body at the material time, as confirmed by defence during oral submission at the end of the prosecution case on 23 October 2019 in open court.
>
> H [105] As such, it is clear that the first element of the offence under s 23 of the MACC Act that is the accused being an officer in a public body has been established.

In this regard, we find that the learned trial judge's conclusion is well supported I by the evidence and the law, and in fact there is no serious challenge by the appellant in respect of this finding.

Second element — Use of position for gratification

[95] To establish the second element of s 23 the prosecution must prove that the appellant had used his position for gratification whether for himself, his relative or associate. In this regard, the prosecution submits that it has successfully proved this second element by clear evidence and by relying on the presumption found in s 23(2) of the MACC Act, which provides for a rebuttable statutory presumption that an accused is presumed to have used his position for gratification when he makes any decision or takes any action in relation to any matter in which he has an interest, whether directly or indirectly.

[96] It is pertinent to highlight that for the purpose of proving the second element of 'using office or position for any gratification', the prosecution can rely on the rebuttable statutory presumption under s 23(2) of the MACC Act, which reads:

> (2) For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for any gratification, whether for himself, his relative or associate, *when he makes any decision, or takes any action, in relation to any matter in which such officer*, or any relative or associate of his, *has an interest, whether directly or indirectly.*

The application of the presumption under s 23(2) of the MACC Act was considered at some length by the learned trial judge. The following passages from the grounds of judgment bear that out:

> [107] In seeking to prove this element, which is the essence of the proscription under s 23(1), the prosecution relies on s 23(2) of the MACC Act. This provides for a rebuttable statutory presumption in that an accused is presumed to use his position for gratification when he makes any decision or takes any action in relation to any matter in which he has an interest, whether directly or indirectly.
>
> [108] It reads, again, as follows:
>
> > 23. Offence of using office or position for gratification.
> >
> > ...
> >
> > (2) For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for any gratification, whether for himself, his relative or associate, when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.
>
> [109] As such, in this case, the presumption of the accused having used his position for gratification will become applicable if the prosecution can show that the accused had made any decision or taken any action in respect of any matter in which the accused had an interest.

A [110] For emphasis, there are therefore two related aspects to this presumption. The first is on whether there were decisions or actions taken by the accused and the second is whether any such decisions or actions concerned a matter the accused had an interest in.

B **[97]** The learned trial judge quite correctly pointed out that there are two related aspects to this presumption. The first concerns the issue of whether the accused made the decision or was involved in the decision making which is the subject of the charge, and the second is whether the accused had an interest in any such decisions or actions. If the prosecution successfully proves the above C two elements, then the s 23(2) presumption, ie that the appellant used his office for gratification, would apply and the appellant is presumed, until the contrary is proved, to have used his office for gratification. This was reiterated by this court in *Siti Aishah bt Sheikh Abd Kadir v Public Prosecutor* [2013] 6 MLJ 86, D when construing the statutory presumption under s 15(2) of the Anti-Corruption Act, which is predecessor equipollent offence to that under s 23(1) of the MACC Act. See also the cases of *Mohamad Taip bin Johari v Public Prosecutor* [2018] MLJU 1894; [2018] 1 LNS 1979; *Abdul Hadi bin Bokhari v Public Prosecutor* [2009] MLJU 1581; [2009] 1 LNS 1678; and E *Public Prosecutor v Amir Dagang* [2009] MLJU 1881; [2009] 10 CLJ 448.

[98] It bears emphasis that s 23 of the MACC Act is derived from the previous regime of corruption legislation that is, s 15 of the Anti-Corruption Act 1997. From our observation, there is not much difference in structure as F well as the wording in s 15 of the ACA 1997 and the current s 23 of the MACC Act, except the following:

(a) the addition of the words 'whether for himself, his relative or associate' in sub-ss (1) and (2) of s 23 of the MACC Act; and

G (b) substitution of the words 'shall be guilty of an offence' to 'commits an offence' in sub-s (1) of s 23 of the MACC Act.

Hence, the principles enunciated in case authorities on s 15(2) of the H Anti-Corruption Act are very much applicable to a charge under s 23(1) of the MACC Act.

[99] That said, the prosecution must prove the following basic facts in order to trigger the application of the presumption under s 23(2) of the MACC Act:

I (a) there is the 'making of any decision or taking any action'; and

(b) such decision or action concerned a matter in which the accused had an interest (directly or indirectly).

The general principle is that, the basic facts constitute prerequisites which must be factually proved prior to invoking any statutory presumption, as was stated by Thomson CJ in *Ng Kim Huat v Public Prosecutor* [1961] 1 MLJ 308:

> It is surely elementary to observe that while a statutory presumption when it arises may operate in place of evidence and so reverse the onus of proof on any point, *the bare potential existence of such a presumption cannot of itself dispense with proof of any fact the existence of which is a condition precedent of the presumption arising.* To say otherwise would be to fly in the face of all the rules of logic.

[100] The use of statutory presumption in our criminal law regime was very well explained by the Federal Court bench in the recent case of *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151 as follows:

> [43] Section 180(4) of the CPC must be read in light of its context and legislative purpose. By so doing, the phrase 'credible evidence proving each ingredient of the offence' in s 180(4) means that the prosecution may prove each ingredient of the offence either:
>
> (a) by adducing credible direct evidence of that ingredient;
>
> (b) by drawing inferences of fact, ie adducing credible circumstantial evidence, from which the ingredient can be inferred; or
>
> (c) by invoking presumptions of law, ie adducing credible evidence of the relevant basic facts, to invoke a statutory presumption that the ingredient exists.
>
> ...
>
> [46] Indeed, a presumption is not evidence; rather, it is a rule of evidence stating how a particular fact can be proved, as supported by the following authorities:
>
> > A presumption has no probative value and is not evidence, being nothing more than a rule of law which assists a party in making out a prima facie case' (see Michigan Law Review, 'Presumptions as Evidence in Criminal Cases' at 504);
> >
> > Presumptions are a special mode of proving facts which must otherwise be proved by evidence. Where there is direct evidence to prove the presumed facts, the presumptions do not need to be applied (see *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649 at 668).
>
> [47] Presumptions of fact and law operate in every legal system. The use of presumptions has always been standard judicial practice. This court has endorsed the use of the presumption in s 37(da) of the DDA by the prosecution to establish a prima facie case of drug trafficking. What is required of the prosecution is to adduce credible evidence of the basic facts (ie the nature and amount of the drug and, possession), in order to rely on the presumption of trafficking in s 37(da). (Emphasis added.)

[101] Therefore, upon prove of the basic facts as stated earlier, the

presumption under s 23(2) of the MACC Act will apply and the accused is legally presumed to have used his office or position for gratification (effectively the whole of the offence under s 23(1)). It then falls on the defence to rebut the presumption on a balance of probabilities.

[102] However, if the prosecution failed to prove the basic facts, the presumption under s 23(2) of the MACC Act will not have any application, which consequently will not only affect the second element of 'using office or position for any gratification' in s 23(1) of the MACC Act, but the whole of the offence under s 23(1) will fall, unless of course if the prosecution adduces direct evidence establishing the fact of the accused using his office or position for gratification.

[103] We find that the learned trial judge had correctly interpreted and applied s 23(2) of the MACC Act. The fact that the appellant took part in the two Cabinet decisions to issue the two government guarantees to KWAP for the loans granted by KWAP to SRC is beyond question. The evidence shows that the appellant was not only present but in fact chaired the two Cabinet meetings held on 17 August 2011 and 8 February 2012, and was thus involved in the decisions of the Cabinet to approve the said government guarantees in favour of KWAP. Tan Sri Mazidah Abdul Majid (PW40) who was the then Deputy Head Secretary (Cabinet) in the Prime Minister's Department confirmed that fact.

[104] The law is well settled in that the physical presence of the appellant at the Cabinet meetings that approved the government guarantees was in law sufficient to establish that he had used his office or position for gratification if it can be shown that he had an interest in those decisions. See: *Public Prosecutor v Dato Haji Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245; [1982] 1 LNS 71. Tan Sri Mazidah Abdul Majid (PW40) further testified that in respect of the first Cabinet decision on 17 August 2011 the relevant papers and memorandum (P537B) dated 15 August 2011 that were presented to the Cabinet was stated to be from the Prime Minister, ie the appellant, and they were tabled by Tan Sri Nor Mohamed Yakcop, then a Minister in the Prime Minister's Department. Whilst for the second Cabinet decision on 8 February 2012, the memorandum dated 3 February 2012 (P527B) came from the Finance Minister, and it was signed by the appellant himself.

[105] PW40 also confirmed that the appellant did not declare his interest in both Cabinet decisions, nor did he withdraw from the discussion in respect of these two items on the agenda, nor did he leave the meetings. Such conduct would militate against the appellant and would go towards establishing the charge under s 23(1) of the MACC Act. When an officer of a public body is present in a meeting where any matter placed for consideration places him in a

conflict position, ie between his official position and his private interest, then he is duty-bound to declare his interest and withdraw and excuse himself from deliberation of that matter. The implication of the failure to disclose that personal interest in the subject matter of the decision is that it gives rise to an inference that the person knew or ought to have known of the conflict between his personal interest and public duty and chose to keep that under wraps. And such failure to distance or extricate himself completely from having to make or be part of the making of the impugned decision is sufficient to regard him in law to have used his office or position for gratification, for such participation in the decision making process would be in furtherance of his personal interest. See: *Public Prosecutor v Amir Dagang* [2009] MLJU 1881; [2009] 10 CLJ 448. Therefore, there is on the shoulder of every public officer the heavy burden and duty to ensure that there is no conflict of interest in every official decision making process.

[106] In fact the *Kod Etika Bagi Anggota-Anggota Pentadbiran* (D559 and D559-A), which is a code of ethics applicable to members of the administration, requires members of the administration to ensure that no conflict of interest arises by virtue of his position as the holder of public office and his personal interest. If such a conflict arises, a public officer must not only declare his interest, but also leave the meeting and his non-attendance during the meeting or deliberations be recorded. This was well covered by the learned trial judge in the grounds of judgment:

> [127] Paragraph 4 of the Code of Ethics also stipulates that the same procedure has to be adhered to where the member of the administration chairs the meeting. Similarly, at meetings to confirm the minutes which contain the decision in relation to his interest, he has to also declare his interest and leave the meeting.
>
> [128] PW40 also testified that this requirement to avoid conflict of interest was adhered to previously and gave several instances where members of the Cabinet had declared their interest and left the meeting to avoid any possible conflict of interest, including the accused himself on a matter involving the financial institutions, at the time when his brother was the chief executive of a banking group.
>
> [129] In this case, to reiterate, the accused did not declare his interest when the Cabinet considered the guarantee proposals concerning the financing by KWAP to SRC at its meetings. Neither did he leave the meeting when the Cabinet deliberated on the matter. He chaired both meetings. All others, being Ministers, were subordinate to the accused. In addition, the accused personally introduced and tabled the proposal on the second guarantee at the Cabinet meeting on 8 February 2012.
>
> [130] These were plainly recorded in the respective minutes of the meetings, and duly confirmed in the subsequent minutes of meetings. The accused was clearly so firmly in a position of conflict of interest and deliberately failed to divorce himself from that invidious situation. His attendance alone, not to mention his failure to leave the deliberation on the government guarantees is sufficient under the law to

having used his public position for gratification under s 23 of the MACC Act.

[107] Hence, there is no doubt that the appellant had taken part in both the Cabinet decisions to issue the two government guarantees to KWAP guaranteeing repayment of loan to SRC, which was a prerequisite and condition precedent for the KWAP loan to SRC. In this regard, the next important question to be asked is whether the appellant had an interest in the subject matter of the two Cabinet decisions to securitise the KWAP loans to SRC by the issuance of the two government guarantees. The answer to this would be crucial to determine if the second part of s 23(2) of the MACC Act had been fulfilled by the prosecution to give rise to the statutory presumption therein.

[108] It is worth noting that the word 'interest' in s 23 of the MACC Act is not statutorily defined. However, it is stated in s 23(2) of the Act that the interest can be either direct or indirect.

[109] The appellant contends that he does not have any personal interest in SRC, and that his interest in SRC is purely professional that arises from his position as Advisor Emeritus, Finance Minister and Prime Minister. The learned trial judge in rejecting that contention held as follows:

> [139] In my judgment, because of his position as the Prime Minister and the Finance Minister of the country, the accused was able to endorse the establishment of SRC, which although stated to be a strategic natural resources development company for the country, was in truth designed to be and did become, for all intents and purposes, a vehicle utilised by the accused for his own private advantage, and importantly managed to secure for SRC the RM4 billion financing from KWAP and the government guarantees for the entire financing, all made possible by the accused's own overarching authority in SRC, as the Prime Minister with the power to appoint and dismiss the directors under the articles, and subsequently also as the sole shareholder of the company as MOF Inc and eventually also as the advisor emeritus of SRC, following the insertion of a provision into the articles with his consent. In other words, the accused had helped to establish SRC which he then used for his private interest.
>
> [140] In my view, the factual matrix concerning the involvement of the accused in SRC demonstrates the existence of an interest of a kind which is caught under s 23(2) of the MACC Act.
>
> *Evidence of the interest of the accused*
>
> [141] Evidence of this interest of the accused, premised on his control of the company, is found in the series of actions and course of conduct performed by him or at his behest which resulted in the approval by the Cabinet of the said two government guarantees. The same conduct which concerned SRC other than his participation in the Cabinet meetings could also be construed as actions taken by the accused on a matter in which he has an interest even though the charge confines

the material period to be between 17 August 2011 and 8 February 2012. However, such conduct and actions performed by the accused prior to 17 August 2011 or subsequent to 8 February 2012 would still be relevant to show the interest the accused had in SRC, and the extent thereof.

[142] Under s 8(2) of the Evidence Act 1950, the conduct of an accused antecedent or subsequent is relevant if such conduct influences or is influenced by any fact in issue or relevant fact.

[110] We find no good reason to disagree with that finding. The learned trial judge concluded from the evidence of the appellant's role and involvement in the establishment of SRC, the initial set up grant, KWAP loans, government guarantee arrangement, as well as the ownership and governance structure of SRC, and the control of the SRC funds and the flow of some of SRC's funds into the personal accounts of the appellant establishes the fact that the appellant had an interest in SRC that was beyond that of his public office. The learned trial judge's detailed consideration of these factors are found in paras 145–264 of the grounds of judgment. And more pointedly the learned trial judge concluded in paras 267–276 as follows:

[267] The foundation and mainstay of the nature of the interest of the accused in SRC is the feature of control. The accused wielded considerable control over SRC. He held the position of overarching authority and power in SRC. This control was rooted in the various seemingly lawful capacities in the governance and ownership of the company exercisable by the accused. The accused had a secret design and private interest in a company he controlled as demonstrated in the course and series of his conduct and action concerning the establishment, financing, guarantee and ownership of SRC which were outside the remit of the exercise of official and public responsibilities.

[268] As the Prime Minister with special powers over the directors in article 67 of the M&A, as advisor emeritus which compelled prior consultation on important and strategic matters and as the sole shareholder of the company, the accused's control was absolute and complete. And his exercise of such authority, pervasive and imperious, as demonstrated by his interactions with parties outside SRC like PW38, PW45, and PW56 directly, and others in indirect manner through the exercise of tacit but predominant influence founded on that position of overarching control.

[269] Two important points must be made again. First, the accused was not just one public servant who was granted these positions in SRC. The person who was vested with this authority was the country's Prime Minister (via the articles on directors' appointment and dismissal and on advisor emeritus) and Finance Minister (as the shareholder via MOF Inc). He was also the advisor emeritus under the M&A of SRC.

[270] Secondly, and this is especially crucial, the accused was himself instrumental in bringing about these monumental powers of control upon himself. After he endorsed the establishment of SRC, Nik Faisal registered the M&A upon the incorporation of the company by inserting articles 67 and 116 on the powers of appointment and termination of directors of the Board of the company to be vested

in the Prime Minister (as well as on the requirement of the Prime Minister's approval before any changes to the M&A could take effect). This could not have been conceivably effected without the consent of the accused as the Prime Minister. Indeed, the accused did exercise these powers when appointing the directors of SRC subsequently.

[271] The creation of article 117 on the Prime Minister being the advisor emeritus of SRC was, as on the paper recommended by Nik Faisal, approved by the accused as the Prime Minister, as similarly done by the sole shareholder of SRC, who as MOF Inc was also the accused. And MOF Inc being the direct shareholder (instead of indirectly through 1MDB) was also pre-approved by the accused as the Prime Minister upon the recommendation of, again, Nik Faisal of SRC.

[272] His controlling interest in SRC, probably not found in any other MOF Inc — owned entities to the same extent, means that any decision as the Prime Minister or Finance Minister in respect of the government guarantees, as framed in the charge against the accused would have been tainted given the obvious conflict. The conflict lies in the fact that whilst the Cabinet which was presided by the accused himself as the Prime Minister would certainly have the responsibility to assess the matter under deliberation at the meetings — of whether to approve the government guarantees to the financing to SRC by KWAP — on the basis of the considerations on government, national and public interests, the accused who chaired the meeting personally had a starkly different consideration in the borrower company over which he had overarching control and private designs and interest.

[273] His involvement could not have been in the best interest of KWAP or the MOF. The financing was primarily approved because of the government guarantee, and less on the commercial justifications of the activities of SRC that supposedly required the massive financing of RM4 billion. But the guarantees were approved on the basis of unverified information furnished by SRC, which appear to be not much different from that earlier commercial justifications submitted to KWAP.

[274] It was decidedly in his interest that the guarantee be approved on both occasions. After all given his considerable powers in SRC, as shown earlier, the accused got SRC to apply to KWAP for financing, told KWAP's CEO (PW38) that he agreed to the financing, informed KWAP's Chairman and Secretary General of the Treasury (PW45) that RM2 billion would suffice (after the accused had been updated that the investment panel was considering to extend only RM1 billion) and at the same time asked PW45 that the approval process be expedited, rushed the process at the MOF on the preparation of the MJM on the government guarantees, and even told its highest-ranking civil servant who was also Chairman of KWAP (PW45) for KWAP to release the second RM2 billion to SRC even before the guarantee document could be made available to KWAP. After all, despite the rush (almost singularly attributed to the accused) to drawdown the total of RM4 billion sourced from the pension fund KWAP, the bulk of the RM4 billion was rapidly instead inexplicably transferred outside the country with no clear confirmation of its actual present status, whilst SRC continued to default on its financing obligations, and nothing to show for any of its purported investments.

[275] All these evidence, and more, exhibiting the accused's controlling interest and SRC's unrelenting pursuit for financing and funds be made available to SRC on

urgent basis, and curiously despite the absence of a well-verified and documented, let alone compelling strategic and investment opportunities, could not by any stretch of imagination possibly have been reconciled with what was expected of him as a member of the administration, which at a Cabinet meeting would have been to ensure the exercise of an independent assessment and judgment on the justifications for the request for the issuance of the government guarantees to secure the financing to SRC by KWAP.

[276] For the avoidance of doubt, it is not the overarching control which the accused wielded over SRC that per se translates into the interest under s 23 of the MACC Act. That is only the enabler, albeit a potent sine qua non. It is the private designs he had in respect of SRC, which was to use SRC for his personal advantage, as demonstrated above in the series of actions and decisions taken by him, made possible by his strong position of control, that renders his relationship with SRC into an interested one, in the nature that is caught under s 23 of the MACC Act.

[111] We find that the learned trial judge had correctly analysed and evaluated the evidence and identified the following factors that materially point to the appellant's interest being prevalent throughout the scheme:

(a) the personal interest to utilise SRC for his benefit by using his position as Prime Minister and Finance Minister to maintain his overarching control of SRC;

(b) his involvement in the loans approval process in KWAP;

(c) his participation at the Cabinet meetings approving the two government guarantees which was motivated by his desire to create access to all the funds of SRC including the RM42m;

(d) his involvement in causing the fast and full drawdowns of the loans and immediately transferring them overseas in order to have greater access to SRC's funds; and

(e) the actual receipt of the RM42m from the funds of SRC into his account, that evidences his premeditated plan and therefore receipt of the gratification that was within his contemplation when he participated in approving the decision to grant the two government guarantees, without which SRC would not have had the funds for the appellant to use for his benefit.

Thus, we agree entirely with the learned trial judge's findings that the appellant's active participation in the Cabinet decision making process to issue the two government guarantees and the final decision in that regard by the Cabinet to approve the two government guarantees, coupled with the glaring personal interest that the appellant had in those decisions brings the appellant squarely within the ambit of the offence under s 23(1) of the MACC Act. The fact that the appellant was subsequently shown to have used the funds of SRC

for his personal benefit also goes towards establishing his personal interest in the Cabinet decision to issue the two government guarantees, without which there would be no loans disbursed to SRC, and without which SRC would not have the kind of funds that were channeled into the appellant's personal accounts. Hence, we find that all factual requirements for the presumption under s 23(2) of the MACC Act has been established and the appellant is presumed by law to have committed the offence of using his office for gratification under s 23(1). It would then be incumbent upon the appellant to rebut that presumption. This principle was reiterated by the Federal Court in the recent case of *Abdullah bin Atan v Public Prosecutor and other appeals* [2020] 6 MLJ 727; [2020] 9 CLJ 151, where Tengku Maimun Tuan Mat CJ in delivering the judgment of the court held:

> [56] The fundamental rule in criminal law is that the prosecution must prove every element of the offence charged beyond reasonable doubt, and that the accused bears no onus of proof. This general rule is however subject to exceptions as there is a limit to what the prosecution can reasonably be expected to prove. The English common law authorities codified in our written law affirmatively recognise that it is lawful in certain cases to shift the onus to the accused to exculpate himself in certain situations. These situations include defences which relate to facts especially within the knowledge of the accused including the proof of lawful authority; or where a statutory presumption provides that a particular fact is presumed to exist unless the contrary is proved (see *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12; [2017] 4 CLJ 41; *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780; and *Jazlie bin Jaafar v Public Prosecutor* [2020] 1 MLJ 417; [2020] 2 CLJ 28).
>
> [57] The role of presumptions in the wider context of the criminal legal system may be simplified thus: where a statutory presumption is invoked to presume the existence of certain fact as being the ingredient of the offence, the onus then shifts to the accused to disprove the presumed fact on the balance of probabilities and to thereby exculpate himself from the charge. If he does so, he earns an acquittal. If he does not, he is guilty of the charge.

[112] We agree with the learned trial judge that with the application of the presumption in s 23(2) of the MACC Act, it is unnecessary at the end of the prosecution stage to determine whether the element of gratification is proved. The offence under s 23(1) of the MACC Act is one of abuse of position by an accused with the intention to obtain gratification. It concerns the prohibition against a public officer using his office for gratification. The words 'using office or position for gratification' in s 23(1) suggests effort/demand by the accused to secure some benefit/advantage, ie some gratification as defined in s 3 of the MACC Act, and not actual receipt of it. Hence, we agree with the learned trial judge that actual receipt of gratification is not an element of an offence under s 23(1) of the MACC Act. The completeness of the offence does not depend on the receipt of gratification. What must be shown, however, is that the use of the position was to obtain gratification. The evidence must show that when the

appellant took part in the two Cabinet decisions to issue the government guarantees he did so with the intention to obtain gratification.

The s 23(4) defence

[113] The appellant submitted that the charge under s 23(1) cannot be sustained because s 23(4) of the MACC Act applied to the instant case. This argument was rejected by the learned trial judge after careful consideration. Section 23(4) of the MACC Act reads:

> (4) This section shall not apply to an officer who holds office in a public body as a representative of another public body which has the control or partial control over the first-mentioned public body in respect of any matter or thing done in his capacity as such representative for the interest or advantage of that other public body.

[114] The learned trial judge quite correctly opined that s 23(4) contemplates two public bodies. The accused in order to avail himself of this provision must be shown to be holding office in the first public body as a representative of another public body which is controlled by the first-mentioned public body. And the decision or action done by the accused as the representative must be for the advantage of the second public body.

[115] The learned trial judge analysed the appellant's contention as regards the application of s 23(4) and doubted that the appellant could be deemed as an officer of SRC and representative of the government. The appellant's role in SRC was by virtue of his position as Prime Minister at the material time. He was granted special powers in the M&A of SRC because of his position in the government. That cannot be translated to the appellant being an officer of SRC. Nor can the appellant's shareholder role in SRC, via MOF Inc, be construed to make the appellant an officer of SRC. The learned trial judge found that s 23(4) cannot apply to the appellant as it has not been shown that the actions taken by the appellant which led to the government's decision to grant the two government guarantees in favour of KWAP guaranteeing the loans granted to SRC were done in the interest or to the advantage of the Government of Malaysia.

[116] The learned trial judge held that on the totality of the evidence, it cannot be said that what the appellant did, including his participation at the two Cabinet meetings approving the guarantees in his capacity as representative of the first entity was for the interest, benefit or advantage of the government. The learned trial judge set out seven reasons in the grounds of judgment why the actions of the appellant cannot be for the benefit of the government:

A [325] It simply could not have been, for the various reasons that have been alluded to earlier, chief among which I will in summary repeat only seven. First, the government guarantees were to secure the RM4 billion financing extended to a newly established company with no track record or relevant experience in relation to the extraction, processing, logistical services and trade of natural resources.

B [326] Secondly, this massive financing of RM4 billion was made possible after a RM3 billion grant request was declined by the EPU who had suggested that funding should be sourced from the commercial banks or the capital markets, to avoid unnecessary exposure to the government, but only for the accused to ask KWAP, a public pension fund, to provide the RM4 billion financing to SRC.

C [327] Thirdly, the Cabinet papers and the MJM were prepared in a rushed manner without sufficient evaluation where even the information on SRC and its future plans could not be properly verified.

[328] Fourthly, subsequent to the drawdown of the loans to SRC, despite it being a
D matter within the remit of the management of the company, the accused as MOF Inc issued shareholder resolutions such as D534 as well as P501 and P530 on the subject of the deposit of the funds of SRC outside the country, which had absolutely nothing to do with the justifications for the financing stated in the Cabinet and KWAP investment panel papers, namely for the extraction, processing, logistical
E services and trade in natural resources.

[329] Fifthly, unsurprisingly, SRC failed to service its debts to KWAP and required funding from the government to avoid the declaration of an event of default by KWAP, necessitating a further three short term loan facilities totalling about RM650m to pay for the interest on the RM4 billion financing. The loans were never
F repaid by SRC, and the government has been honouring its guarantees by periodic payments to KWAP.

[330] Sixthly, the attempt by PW56, the Second Finance Minister to travel to Switzerland to verify the status of the funds of SRC in BSI Bank allegedly frozen by the Swiss authorities was denied by the accused.

G [331] Seventhly, RM42m from SRC found its way into two of the accused personal bank accounts in 2014 and 2015, and promptly utilised by the accused for his personal benefit (this will be analysed with greater granularity in the section on the three CBT charges).

H [332] Evidence also shows that SRC was not just like any other MOF Inc companies. Unlike most others, SRC was under the control and direction of the accused from day one. Even upon the incorporation of SRC, and before 1MDB and MOF Inc became the shareholder of SRC, the accused already wielded considerable powers in SRC in view of articles 67 and 116 of the articles of association of the company which conferred on the accused as the Prime Minister the authority on the
I appointment and removal of directors as well as on any amendment to the memorandum and articles of association of SRC.

[333] And later the accused, this time in his capacity as the MOF Inc moved to further solidify his controlling position by causing the insertion of article 117 making the Prime Minister the advisor emeritus of SRC, whose advice must be

sought on key matters. The overarching powers in the M&A and as its sole shareholder had the effect of making the accused the ultimate decision maker in SRC, where nothing of importance could be decided by SRC without the input or knowledge of the accused.

[334] The involvement of the government machinery, in particular the MOF in overseeing its ownership and investments in MOF Inc companies on matters concerning SRC was however far from apparent, if almost non-existent and evidence from Datuk Fauziah Yaacob (PW53) a then Deputy Secretary General of the Treasury and the former Second Finance Minister (PW56) instead shows that attempts to assert oversight over SRC never succeeded. In stark contrast however, the accused's personal involvement and interventions in the name of either the Prime Minister or the Finance Minister on SRC matters with the assistance of Nik Faisal, the CEO & Director of SRC (and concurrently the mandate holder for his three personal AmIslamic Bank accounts), were disproportionately and glaringly both pervasive and imperious.

[335] That these involvement and interventions reflect the presence of the accused's own private vested interest in SRC is manifest.

[117] The appellant failed to effectively answer any one of these seven points. There was simply no reason why the government would go out of its way to assist SRC, a newly incorporated company without any track record. The speed and manner with which the loans were approved by KWAP, without proper diligence; the manner in which the government guarantees were arranged and approved, which were described by witnesses as being rushed and expedited; and the disbursement of the colossal sum of RM4 billion from the country's pension fund, and the manner in which the disbursed loan amounts were spirited out of the country when there were no discernable investments that required the funds does not help the appellant's case. In fact these facts demolish the appellant's defence. There is a total lack of evidence as to what purpose the RM4 billion of public funds were actually utilised, if indeed they were for the benefit of the Government of Malaysia and its people, surely there would be some evidence of that. However, the glaring fact is that SRC defaulted on the loans repayment to KWAP, and the government had to incur further costs and expense. One wonders what benefits the appellant's actions brought to the Government of Malaysia. Given this, under no circumstances could the actions taken and decisions made by the appellant at the two Cabinet meetings be said to be for the interest or advantage of the government.

The time gap argument

[118] Learned counsel for the appellant also raised some issue as regards the time gap between the RM42m, ie gratification mentioned in the charge, being deposited into the appellant's personal accounts and the Cabinet decision to grant the two government guarantees. The appellant's counsel's contention is that it could not have been the case that the appellant had acted corruptly in

respect of the approval of the two government guarantees in 2011 and 2012 in order to obtain the gratification which materialised a few years later in late 2014 and early 2015. In other words, counsel for the appellant argues that the gratification must be the immediate and intended result of the use of one's office or position. Learned counsel for the appellant submits that there was no such nexus as there is a time gap of about three years between the dates of the Cabinet meetings and the dates of the monies entering the appellant's accounts, which according to learned counsel negated the mental element necessary for the offence under s 23 of the MACC Act.

[119] The learned trial judge considered this argument in some detail before rejecting it. We are in full agreement with the findings of the learned trial judge in this regard. As pointed out earlier, the actual receipt of gratification is not an element of the offence under s 23(1) of the MACC Act. The offence under s 23 of the MACC Act was complete when the appellant made the decision or took any action in relation to any matter in which he himself or any relative or associate of his, has an interest, directly or indirectly. As explained earlier there is no necessity for proof of actual receipt of the gratification for the offence under s 23(1) of the MACC Act to be completed.

[120] In this regard, the appellant's participation in the two Cabinet meetings, chairing and thereafter approving the government guarantees in favour of KWAP for the total of RM4 billion loan to SRC satisfies the requirement of factual proof of 'when he makes the decision, or takes any action' as stipulated under s 23(1) and (2) of the MACC Act, rendering effective the operation of the presumption of 'use of office or position for gratification'.

[121] In this respect and in response to the appellant's contention of the need to prove immediate and direct nexus of the corrupt intention at the time of making decision or taking any action with the exact amount of RM42m gratification, the learned deputy submitted that it need not be so proved. This is because the mens rea element of the offence of 'using office or position for gratification' is presumed pursuant to s 23(2) upon factual proof of the appellant's 'making of decision or taking any action' and the appellant's personal interest in that decision. We would agree with that contention. The statutory presumption under s 23(2) of the MACC Act takes care of that.

[122] Now, as an analogy, if a public officer, say the Director of Planning of a local authority agrees to approve planning permission submitted by a developer in return for the developer giving him two units of houses to be constructed in that development; and subsequently the said Director of Planning at the Planning Committee meeting chairs and approves the application, the Director of Planning would have committed an offence under s 23(1) of the MACC Act, notwithstanding the fact that house is yet to be built and that it

may take several years for the houses to be completed. If the law were to require close proximity in time between the time the impugned decision or action was taken and the time when the gratification was actually received, potential offenders could escape culpability by arranging the actual receipt of gratification at a much later date. If such proximal nexus in time were to be imposed, it would defeat the legislative intent in enacting s 23(1) of the MACC Act which was to root out unscrupulous public officers who abused their office or position for gratification.

[123] By the very wording and language of s 23(1) of the MACC Act reading together with s 23(2) of the same Act, we are of the view that the offence under s 23 of the MACC Act (offence of using office or position for gratification) is complete once the accused took any decisions or actions in which the accused has an interest. The receipt of gratification is not an element of the offence and it is unnecessary for the prosecution to prove the same.

The contention that the failure to specify the appellant's interest in the charge renders the charge defective

[124] Learned counsel for the appellant also raised the issue of whether the non-specification of the appellant's interest in the charge under s 23(1) rendered the charge defective. Learned counsel argued that the charge is defective because it did not specify the nature of the appellant's interest that would have warranted the appellant's withdrawal from participation at the two Cabinet meetings. The learned deputy on the other hand submitted that there is no such requirement in law. The learned trial judge considered this argument, and agreed with the prosecution's stand and reasoned it thus:

> [366] The defence argued that the charge is defective as it did not specify the interest that the accused had, which would have necessitated his withdrawal from participating in the Cabinet meetings on 17 August 2011 and 8 February 2012. The prosecution submitted that there is no legal requirement to specify the interest of the accused in the charge.
>
> [367] I agree with the submission of the prosecution. This is because the offence of using office or position for gratification under s 23(1) of the MACC Act, as set out earlier, does not make any mention of the word 'interest'. It is plainly not an element of the offence under s 23(1). But it is pertinent in the event the prosecution intends to rely on the legal presumption provided in s 23(2) of the MACC Act, like the case presently.
>
> [368] As stated earlier, s 23(2) of the MACC Act states that when an officer of a public body makes any decision, or takes any action, in relation to any matter in which he has an interest, whether directly or indirectly, he shall be presumed to have used his office or position for gratification, unless the contrary is proved. In other words, in that context, it is for the prosecution to adduce the requisite evidence to demonstrate the interest in question with a view to invoking the presumption. The

prosecution has done that. In my judgment, successfully.

[369] Neither is there basis to even suggest that the defence was in any manner prejudiced in his defence or had any problem understanding the charge, especially when the defence team spent considerable time in its extensive, intense and detailed cross-examination of the witnesses for the prosecution throughout the trial.

[370] I also note that this objection was not raised in the defence's application to strike out all the seven charges which were heard and dismissed in the earlier stage of the trial. There is thus no basis in this contention.

[125] We are in full agreement with the reasoning of the learned trial judge in holding that there is no requirement in law for the nature of the appellant's interest in the decision to be stated in the charge. The interest element is not an integral part of the offence under s 23(1), being an offending provision. Section 23(2), on the other hand, is an evidential provision. Hence, if the prosecution intends to rely on the presumption found in s 23(2) then it would be incumbent upon the prosecution to establish the fact via admissible evidence of the accused's interest in the decision or action that is subject matter of the charge. Hence, that is an evidential matter, ie establishing the basic facts giving rise to the statutory presumption. Here, as discussed earlier, we find that the prosecution has successfully established basic fact of the appellant's interest to invoke the presumption.

In any event, s 156 of the CPC makes it abundantly clear that no omission of particulars is material unless the accused was misled. Based on the rigor and manner of cross-examination of the prosecution witnesses, particularly on the issue of the appellant's interest in SRC and his private interest in the approval of the two government guarantees, it cannot be gainsaid that the appellant was prejudiced by any lack of particulars in the charge. The appellant knew very well what the charge under s 23(1) of the MACC Act against him entailed and he did not suffer any prejudice as regards the charge, or the lack of any particulars. For sake of completeness, we reproduce s 156 of the CPC:

156 Effect of errors

No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

The contention that the appellant's intervention was not needed as MOF had agreed to provide security for the KWAP loans

[126] The appellant also raised the issue of Ministry of Finance's (MOF) apparent agreement to grant security for the KWAP loans, which according to the appellant negated the need for appellant's intervention on the issuance of

the government guarantees. This argument is premised on an answer provided by PW45 during cross-examination in relation to KWAP's Investment Panel meeting. However, there is no evidence to show that MOF had agreed in principle to provide security for the loans. In any event it must be noted that pursuant to s 2(2) of the Loans Guarantee (Bodies Corporate) Act 1965 only the Cabinet can agree to provide any government guarantee, though the instrument itself may be signed by the Finance Minister. Section 2 of the Act reads:

> (1) The Government may, in relation to any loan raised by any body corporate to which this Act has been declared to apply under section 3 (hereinafter referred to as 'a body corporate' or 'the body corporate,' as the case may be) guarantee the discharge by the body corporate of its obligations under any agreement which may be entered into in connection with the raising of the loan or under any bond, promissory note or other instrument issued pursuant to the agreement; and the said guarantee shall be in such manner and on such terms and subject to such conditions as may be agreed between the Government and the authority from which the loan in raised.
>
> (2) Any guarantee given under this section shall be given in writing in the name of the Government and the guarantee and any endorsement on any bond, promissory note or other instrument of any guarantee given under this section may be signed on behalf of the Government by the Minister or by any person or persons authorised thereto in writing by the Minister.
>
> (3) Subject to subsection (4) the Minister shall, as soon as possible after a guarantee under this section is given, lay before the Dewan Rakyat a statement of the guarantee together with a copy of the agreement aforesaid.
>
> (4) Subsection (3) shall not apply to a guarantee or to any agreement which is certified by the Minister to contain confidential matters; and it shall not apply to such a guarantee until and unless those matters cease to be confidential.

[127] In addition to that, s 6 of the Loans Guarantee (Bodies Corporate) Act 1965, provides:

> 6 Restriction on borrowing powers of body corporate so long as guarantee outstanding
>
> So long as the Government shall continue liable under any guarantee given under this Act in respect of any sums raised by a body corporate, the body corporate shall not except with the consent of the Minister exercise any other power to borrow possessed by it.

When the second government guarantee was in the process of being approved, there first government guarantee was still subsisting. Hence, pursuant to s 6 of

A the Loans Guarantee (Bodies Corporate) Act 1965 the Finance Minister's consent was required. However, when the appellant was questioned on this, he failed to provide any evidence of his consent to the second government guarantee.

B **[128]** Additionally, the requirements under s 7 of the Loans Guarantee (Bodies Corporate) Act 1965 were also not complied. Section 7 of the Act provides:

> 7 Powers exercisable by government in event of prospect of default by body
C corporate
>
> (1) Where it is made to appear to the Yang di-Pertuan Agong that there is reasonable cause to believe —
>
> (a) that a body corporate is likely to fail or be unable to discharge any of its
D obligations under any agreement concluded by it under this Act or under any bond, promissory note or other by instrument issued pursuant to any such agreement: and
>
> (b) that the Government is or may become liable under any guarantee given under this Act in respect of that obligation, the Yang di-Pertuan Agong
E may by order give or authorise any other person to give such directions to the body corporate as he or that other person may from time to time think necessary or desirable to ensure that satisfactory arrangements are made by the body corporate to enable it duly to discharge its obligations under such agreement, bond, promissory note or instrument or under this Act.
>
> F (2) The body corporate shall notwithstanding any provisions contained in the written law by which it is established comply with any directions given by or under any such order.

G However, there is no evidence of the Yang di-Pertuan Agong ('YDPA') being informed that SRC is likely to fail or unable to discharge its obligations under the KWAP loan agreements and the impact and potential liability of that event of default on the government guarantees. There is also no evidence that the YDPA had by order given, or authorised any other person to give such directions to SRC, as he or that other person may from time to time think
H necessary or desirable to ensure that satisfactory arrangements are made by SRC to enable it to duly discharge its obligations under the KWAP loan agreements. In fact there is no evidence of the YDPA of ever being informed of SRC's default of the loans, nor of the subsequent short-term loans issued by MOF totaling some RM650m to service the interest on the loans. Evidence
I shows that only the first short-term loan was brought to the Cabinet for approval, while the second and third short term loans were approved by the appellant himself. Hence, even the statutory protections that parliament in its wisdom had considered necessary to be in place to protect the government's financial interests were blatantly disregarded by the appellant.

The appellant's contention of duplicity/misjoinder of charges

[129] The appellant contended that since there were two separate Cabinet meetings, the s 23 of the MACC Act charge against the appellant seems to have combined two separate and distinct offences, one in 2011 and the other in 2012 under one charge. This, the learned counsel for the appellant submits is offensive to s 163 of the Criminal Procedure Code ('the CPC'), and that it is a serious transgression of the rule against duplicity and/or multiplicity of charges. Learned counsel further contends that this has occasioned serious prejudice to the appellant.

[130] Section 163 of the CPC reads:

> 163 Separate charges for distinct offences
>
> For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, *except in the cases mentioned in sections 164, 165, 166 and 170*.
>
> ILLUSTRATION
>
> A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

Section 163 of the CPC provides for two general rules, namely:

(a) the rule against duplicity which is a prohibition against the lumping or incorporating of more than one offence in a single charge; and

(b) the rule against misjoinder of charges, that is, every distinct charge be tried separately, except in cases mentioned in ss 164, 165, 166 and 170 of the CPC.

[131] The learned deputy, on the other hand, submits that the s 23(1) MACC Act charge does not offend s 163 of the CPC as the acts of the appellant between the dates of the two Cabinet meetings specified in the charge are a series of acts so connected together as they form the same transaction, and hence fall under s 165(1) of the CPC exception which reads:

> 165 Trial for more than one offence
>
> (1) If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

[132] The learned deputy submits that both Cabinet meetings stated in the charge are clearly one single transaction under s 165(1) of the CPC, and reiterates that the evidence shows the appellant's prevalent interest throughout

the scheme forming the single transaction. This according to the learned deputy can be seen from the chronology of events beginning from the inception of SRC on 4 January 2011, the approval of the first loan by KWAP on 19 July 2011, the approval of the first government guarantee by the Cabinet on 17 August 2011, the approval of the second government guarantee by the Cabinet on 8 February 2012, the approval of second loan by KWAP on 20 March 2012, and the almost immediate transfer of the two loans of RM2 billion each out of jurisdiction, were over a period of 14 months. The learned deputy's contention is that this establishes a single criminal intent of the appellant in furtherance of the premeditated and continuous plot over a period of time to ensure that SRC funds are available to him for his taking.

[133] We are in agreement with the submissions of the learned deputy in this regard. A series of acts separated by intervals in time could still form one transaction and can be construed as a continuous single transaction for one specific criminal intent. The Federal Court in *Public Prosecutor v Dato' Waad bin Mansor* [2005] 2 MLJ 101; [2005] 1 CLJ 421 authoritatively states why the conduct of the appellant must be viewed in its entirety when construing whether the charge had been proved. The Federal Court held that attention must be paid to the insidious conduct of the accused in respect of his role in the entire episode from the time of incorporation of the company that was used to perpetrate the offence and achieve the corrupt intention of the accused. Similarly in *Mohamed Ramly bin Haji Rasip v Public Prosecutor* [1941] 1 MLJ 31, a series of acts separated by intervals were construed as one transaction when they were connected by a single criminal intent in furtherance of a continuous plot.

[134] In the present appeal, the involvement of the appellant in this criminal enterprise can be seen right from the incorporation of SRC, to the approvals of KWAP loans, which were secured by the government guarantees, in which the appellant was involved in the approval, right up to the time a part of the SRC funds amounting to RM42m were deposited into the appellant's personal bank accounts for his personal interest and benefit. The evidence clearly shows a series of events which ultimately form the narrative of a single transaction. The appellant's decisions and actions with regards to SRC were done over a period of time by continuous acts and inter-connected events, primarily for his own personal benefit. The motivation to participate in the Cabinet meetings and approve the government guarantees is to create access to SRC's funds, including the RM42m that ultimately entered the appellant's personal accounts. Hence, we find that the mention of the two Cabinet decisions in the single charge under s 23(1) of the MACC Act does not offend the rule against duplicity of charges. There are no two offences in the s 23(1) of the MACC Act charge. There is only one charge with a long time span as the transaction was a

rather long one. Hence, we find that there is no duplicity or misjoinder of charges.

The national interest defence

[135] The appellant in his defence said that all his actions as regards SRC were for national interest and that he had no personal interest. This was termed by learned counsel for the appellant as the 'defence of national interest' ostensibly for reasons that the actions of the appellant were in the national interest. In putting forth this defence, the appellant was primarily relying on the testimony of the former attorney general, Tan Sri Apandi Ali (DW14), the former MACC Chief Commissioner, Tan Sri Dzulkifli Ahmad (DW17) and the former Treasury Secretary General, Tan Sri Mohd Irwan Siregar (DW3).

[136] DW14 had testified that he had during his tenure as the attorney general exonerated the appellant of any wrongdoing as regards SRC. This was based on the conclusion of the SRC investigations then, where the appellant was found not to have any knowledge of the offences committed. He further testified that in January 2016, he had instructed MACC to close investigations against the appellant as he was satisfied that there was no evidence that the appellant had abused his position to approve the government guarantees for the SRC loans from KWAP. However, during cross-examination, DW14 agreed that the decision he made was based on available material in the investigation papers as at 26 January 2016. DW14 further agreed that he was not aware that thereafter a further 76 new statements and several further statements were recorded from witnesses relevant to the investigations. The learned trial judge had considered DW14's evidence and concluded that his evidence does not cast any doubt on the prosecution case, simply because there had been further investigations after January 2016. DW14's conclusions and instructions in January 2016 were based on investigations conducted till then.

[137] In fact DW14 confirmed that the two flow charts that he held during his press conference on 26 January 2016 to exonerate the appellant were the same flow charts that were tendered in evidence by the prosecution. The said flow charts clearly show the funds of SRC entering the appellant's bank accounts, and that they were not Arab donations as contended by the appellant. In any event the opinion and decision of an attorney general does not bind his successor. The attorney general of the day is free to decide and exercise his constitutional and legal powers in accordance to the law. The discretion to charge any person, even if the previous attorney general had chosen not to, vests with the attorney general of the day pursuant to art 145(3) of the Federal Constitution.

[138] In any event, the general law is that the opinion of any person, even if that person is the former attorney general, is not relevant in any court proceeding. The court forms its decision on cogent admissible evidence, not on the opinion of others, except when such opinion is an exception to the general rule, like that of an expert. To this end, the learned trial judge was entirely correct to state that the opinion of DW14 and also DW17 cannot replace the evidence before it to arrive at a fair and just decision.

[139] DW17 had testified and confirmed based on two press releases in August 2016, ie during his time as MACC Chief, that investigations on the SRC matter were still continuing. This was despite his earlier finding that the appellant was not implicated in the SRC case, and his recommendation to the then attorney general (DW14) that no further action be taken on the matter. The evidence of DW17 showed that even though the then attorney general had exonerated the appellant from any involvement in the SRC matter, the MACC were still investigating SRC. It became evident at trial that the further investigations and additional evidence that was gathered culminated in the present charges against the appellant.

[140] DW3's evidence was also considered in some detail by the learned trial judge. In the overall, the evidence of DW3 did not have any effect on the prosecution's case, nor did it raise any doubt. The appellant attempted to rely on the evidence of DW3 for the purposes of establishing his line of defence that the principal consideration in granting the government guarantees to SRC was the promotion of national interest as a strategic investment vehicle, and that SRC's ability to repay the loans were not the primary consideration. However, this attempt seems to have fallen flat when DW3 confirmed that whether it is a newly formed government linked company or not, or whether it had some strategic investments purpose, the ability to repay the loan was the prime consideration. In fact it would be rather absurd for the government to guarantee a loan to a government linked corporate body knowing well that that corporate body does not have the ability to repay the loan or service the interest. Certainly it would not be in the national interest to have a stable of insolvent companies, with full government exposure to the loans taken by these companies. That's simply bad financial management of public funds.

[141] The appellant was actively involved in ensuring that the KWAP loans were disbursed to SRC. However, after the funds had been disbursed, the appellant became indifferent to the whereabout of the funds, and did not inquire from SRC as to what had happened to the funds, nor how it was utilised and for what purpose. He even instructed the second Finance Minister then to keep off SRC. This conduct of the appellant can be indicative of only one thing, and that is, once the funds had been secured by SRC, over which the appellant had overarching control, he was free to utilise them for his personal

benefit. This is manifested by the flow of the RM42m from SRC into his personal accounts. This is definitely not something that can be said to have been done in the national interest. There is no national interest here, just national embarrassment.

[142] In the final analysis, we find that the learned trial judge was entirely correct in finding that the prosecution had proved a prima facie case under s 23(1) of the MACC Act.

The charges under s 409 of the Penal Code

[143] Now, s 409 of the Penal Code reads:

> 409 Criminal breach of trust by public servant or agent
>
> Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or an agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping, and shall also be liable to fine.

In respect of a charge of criminal breach of trust, Wan Suleiman FCJ in *Public Prosecutor v Yeoh Teck Chye and Lim Hong Pung & Anor v Public Prosecutor* [1981] 2 MLJ 176; [1981] 1 LNS 93 said that in respect of a charge of criminal breach of trust:

> Harking back to first principles, for a person to be guilty of the offence of criminal breach of trust he should be:
>
> (i) entrusted with property or dominion over the property;
>
> (i)(a) that he should dishonestly misappropriate or convert it to his own use; OR
>
> (b) dishonestly use or dispose of the property or wilfully suffer any other person so to do in violation of.
>
> (iii)(a) any direction of law prescribing the manner in which such trust is to be discharged; OR
>
> (b) of any legal contract made touching the discharge of such trust.

[144] However, in respect of a charge under s 409 of the PC, there is the added requirement for the prosecution to prove that the accused was in the capacity of a public servant or an agent entrusted with property, or with any dominion over property. Thus, in respect of the three charges under s 409 of the PC against the appellant, the learned trial judge correctly held that the key ingredients that must be established by the prosecution are, first, the appellant was an agent within the meaning ascribed in s 402A of the PC, secondly that he was in that capacity entrusted with or had dominion over property belonging

to SRC, and thirdly, that the appellant dishonestly misappropriated or converted the property to his own use. At the close of the prosecution case, after having done a maximum evaluation of the evidence, the High Court judge found that all the elements of the offence under s 409 of the Penal Code had been established by the prosecution in respect of all three charges. Accordingly the learned trial judge held that a prima facie case has been proved and called upon the appellant to enter his defence to the charges. At the end of the defence case, after evaluating the evidence in its totality, the learned trial judge found that the appellant had failed to raise any reasonable doubt in the prosecution case and accordingly held that the prosecution had established its case beyond reasonable doubt and thus convicted the appellant on all three charges under s 409 of the Penal Code ('the PC').

[145] The appellant contended before us that the High Court's conviction of the appellant on all three charges under s 409 of the PC is unsafe and urged appellate intervention. The learned counsel for the appellant attacked the learned trial judge's findings on many fronts. The first of which was their contention that the key element of agent had not been established.

[146] An offence under s 409 of the PC is in effect the embodiment of a more serious form of criminal breach of trust simpliciter that is found in s 405 of the PC that reads:

> 405 Criminal breach of trust
>
> Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'.

The more serious nature of the offence and enhanced sentence in s 409 of the PC is premised on the capacity of the accused as a 'public servant or agent' in committing the criminal breach of trust of property that is entrusted to him or over which he has dominion.

[147] Hence, as correctly stated by the learned trial judge, the elements of the charges under s 409 of the PC that the prosecution need to establish are:

(a) the agency capacity of the appellant;

(b) that he was in that capacity entrusted with property or entrusted with dominion over property belonging to SRC, ie its funds in this case; and

(c) that the accused committed criminal breach of trust as specified in s 405

of the PC.

First element — The agency capacity of the accused

[148] The charge against the appellant states that he had committed the offences under s 409 of the PC in his capacity as an agent, to wit, the Prime Minister, Finance Minister Malaysia, and the Advisor Emeritus of SRC. The charge in the original Malay language states that the appellant committed the offence as:

> ... seorang ejen, iaitu Perdana Menteri dan Menteri Kewangan Malaysia, dan Advisor Emeritus SRC International Sdn Bhd ('SRC'), dan dalam kapasiti tersebut, diamanahkan dengan penguasaan ke atas wang milik SRC ...

[149] There is a statutory definition for 'agent' in s 402A of the PC, which was introduced by the Penal Code (Amendment) Act 1993 to broaden the interpretation of the meaning of agent in s 409 which the courts had hitherto held to apply only to 'professional' agents such as bankers, lawyers and brokers and not to directors who were construed as 'casual' agents. See, for example, the Court of Appeal's judgment in the case of *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557; [1996] 3 CLJ 187, on the construction and application of the term 'agent' under the former s 409 and prior to the introduction of the s 402A definition of 'agent'.

[150] Currently, s 402A of the PC defines 'agent' and 'director' as applicable to s 409 in the following terms:

> 402A Definition of 'agent', 'company', 'director' and 'officer'
>
> For the purposes of sections 403, 404, 405, 406, 407,408, 409, 409A, 409B, 415, 416, 417, 418, 419 and 420 of this Chapter, unless the contrary appears from the context:
>
> 'agent' includes any corporation or other person acting or having been acting or desirous or intending to act for or on behalf of any company or other person whether as agent, partner, co-owner, clerk, servant, employee, banker, broker, auctioneer, architect, clerk of works, engineer, advocate and solicitor, accountant, auditor, surveyor, buyer, salesman, trustee executor, administrator, liquidator, trustee within the meaning of any Act relating to trusteeship or bankruptcy, receiver, director, manager or other officer of any company, club, partnership or association or in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or not;
>
> 'company' means a company incorporated under any relevant law for the time being in force or pursuant to any corresponding previous enactment and includes any statutory corporations;
>
> 'director' includes any person occupying the position of director of a company, by whatever name called, and includes a person who acts or issues directions or

A instructions in a manner in which directors of a company are accustomed to issue or act, and includes an alternate or substitute director, notwithstanding any defect in the appointment or qualification of such person;

B **[151]** The three charges under s 409 of the PC as drafted by the prosecution allege that the appellant was entrusted with dominion over the property of SRC in his capacity as an agent, being the Prime Minister, Finance Minister of Malaysia and Advisor Emeritus of SRC. The learned trial judge found the appellant was an agent as per the definition in s 402A in two ways. The first is by construing the appellant's role in SRC to come within the definition of C 'director' in s 402A; and the second is by construing that the appellant's acts vis a vis SRC carried out in his capacity as the Prime Minister, Finance Minister and Advisor Emeritus (as provided in SRC's M&A), and the overarching control that the appellant had over the affairs of SRC, to bring it within the ambit of a 'person acting or having been acting or desirous or intending to act D for or on behalf of any company ... in any capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or not.', which falls within the extensive and non-exhaustive definition of 'agent' in s 402A of the PC.

E Whether appellant was a director/shadow director

[152] Section 402A defines director in the following terms:

F 'director' *includes* any person occupying the position of director of a company, by whatever name called, *and includes* a person who acts or issues directions or instructions in a manner in which directors of a company are accustomed to issue or act, *and includes* an alternate or substitute director, notwithstanding any defect in the appointment or qualification of such person;

G As stated earlier, s 402A of the PC, which among others provide for the definition of the words 'agent' and 'director', came into the statute books following the Penal Code (Amendment) Act 1993 (Act A860) that came into force on 17 September 1993. Now that these words are statutorily defined, they must necessarily be interpreted within the strict confines of the language in H s 402A of the PC and be construed as defined in that same legislation. See the decision of the Supreme Court in *Yap Sing Hock & Anor v Public Prosecutor* [1992] 2 MLJ 714; [1992] 4 CLJ 1950; [1992] 1 CLJ Rep 356. And in interpreting the word 'director' in s 402A of the PC, we agree with the submission of the learned deputy that a construction that would best promote I the object and purpose of the said section should be preferred in line with s 17A of the Interpretation Acts 1948 and 1967.

[153] In this regard, the learned trial judge had referred to the Hansard, and to the excerpt of the speech of Dato' Syed Hamid bin Syed Jaafar Albar, a Cabinet

Minister then, in tabling the amendment Bill in Parliament, where the Honourable Minister explained that the intent and purpose of the introduction of s 402A was to rid the existing provisions of loopholes and uncertainties that could unjustly or unjustifiably result in acquittals of persons charged with white collar crimes on mere technicalities.

[154] In that respect, the following passages from the learned judge's grounds are relevant:

> [421] Furthermore, I cannot disagree with the submission of the prosecution which highlights what had been expressed by the relevant Cabinet Minister when tabling in Parliament the said 1993 amendments which refined s 405 and included a new s 402A of the Penal Code. An excerpt of the speech of Dato' Syed Hamid bin Syed Jaafar Albar in the Hansard on Wednesday, 4 August 1993 (at p 6293) reads as follows:
>
> > Pindaan juga dibuat bagi memasukkan definisi baru seperti yang disebut dalam Fasal 5. Pindaan-pindaan tafsiran di atas dicadangkan dibuat untuk mengatasi masalah pentafsiran teknikal yang menjadi asas pelepasan mereka yang telah dituduh di mahkamah. *Ianya juga bertujuan melengkapkan peruntukan yang sedia ada agar kelonggaran peruntukan perundangan tidak dipergunakan sebagai asas pelepasan mereka yang terlibat. Seperti yang telah disebut, peningkatan kesalahan-kesalahan jenayah kolar putih amat membimbangkan dan mungkin akan mengganggu-gugat kepentingan awam dan sekali gus pertumbuhan ekonomi negara.*
>
> [422] It is plain from the Hansard that the rationale for the amendment to s 405 and the attendant introduction of s 402A is to overcome the technical interpretative difficulties then causing problems to the determining the true application of the law on the crime of CBT under s 405, as I have discussed in reference to the Court of Appeal decision in *Periasamy Sinnappan v Public Prosecutor*. The speech as recorded in Hansard states clearly that the changes were intended to rid the existing provisions of loopholes and uncertainties that could result in acquittals of persons charged with white collar crimes, which was on the rise, against the interest of the public.

[155] Hence, we agree that with regards to the offence under s 409 of the PC, the specific words such as 'agent', 'director' and 'company' defined in s 402A must be interpreted as intended by the legislature in a purposeful manner, and in doing so the clear language used in the definition of these key words in s 402A shall apply.

[156] Learned counsel for the appellant submits that the definition of 'director' in s 402A must be taken to mean that the phrase '... and includes a person who acts or issues directions or instructions in a manner in which directors of a company are accustomed to issue or act, ...' is subsumed into the preceding phrase that reads 'includes any person occupying the position of

director of a company, by whatever name called'. Thus, counsel for the appellant argues that the person who '… acts or issues directions or instructions in a manner in which directors of a company are accustomed to issue or act, …' must already be a person who is 'occupying the position of director of a company, by whatever name called'. Hence, the appellant is asking this court to read the definition of 'director' in a restrictive manner and limit it to only persons who hold some position in the company and upon whose directions or instructions the directors of the company are accustomed to act.

[157] We find that the interpretation of the word 'director' as urged upon by the appellant would lead to absurdity. Such a restrictive interpretation would mean that an 'outsider' who is the actual directing mind and alter ego of the company, who is lurking in the shadow and instructing the directors of the company in the manner in which the directors are accustomed to act would not be caught by that restrictive interpretation. Such an interpretation would exclude de facto or shadow directors from the ambit of definition of 'director' in s 402A of the PC, despite the patently inclusive provision.

[158] It is obvious from the definition in s 402A of the PC, that an 'agent' includes a company director; and a 'director' is defined as not merely one who is duly appointed and occupying the position as such but also 'a person who acts or issues directions or instructions in a manner in which directors of a company are accustomed to issue or act'. This second category of persons are generally termed 'shadow directors' and is a recognised persona in law.

[159] We are in agreement with the learned trial judge that the words 'and includes' which is used thrice in the definition of 'director' in s 402A of the PC, is used in that manner to denote three different categories of persons who would be categorised as 'director' for the purposes of that section. Hence, the provisions in s 402A must be read disjunctively for each category after the words 'and includes', and when done so it gives rise to three separate and distinct limbs or categories of persons who would be regarded as 'directors' and they are:

(a) any person occupying the position of director of a company, by whatever name called;

(b) a person who acts or issues directions or instructions in a manner in which directors of a company are accustomed to issue or act; and

(c) an alternate or substitute director, notwithstanding any defect in the appointment or qualification of such person.

[160] In so ruling, we find support from the decision of the Supreme Court in *Dato Mohamed Hashim Shamsuddin v Attorney-General, HongKong* [1986] 2 MLJ 112, where the apex court ruled that punctuation in any written law may

be used as a guide to interpretation. Abdoolcader SCJ speaking for the Supreme Court said:

> The day is long past when the courts would pay no heed to punctuation in any written law (*Hanlon v Law Society* [1981] AC 124, 197–198 per Lord Lawry) and the presence or absence of a coma may be highly significant (*Re Steel (deceased), Public Trustee v Christian Aid Society* [1979] Ch 218; *Marshall v Cottingham* [1981] 3 AER 8, 21).

[161] This principle of statutory construction was applied by Clement Skinner J (later JCA) in *William Minggu a/k Nyegang & Anor v Public Prosecutor* [2002] 3 MLJ 583 in construing the importance of punctuation, ie a comma followed by the word 'and' in s 2 of the Anti-Corruption Act 1997 (now repealed). In that definition section, the phrase 'officer of a public body' was defined in the Act as follows:

> 'officer of a public body' means any person who is a member, an officer, an employee or a servant of a public body, and includes a member of Parliament, a member of the State Legislative Assembly, a judge of the High Court, Court of Appeal or Federal Court, *and any person* receiving any remuneration from public funds, and, where the public body is a corporation sole includes the person who is incorporated as such funds, *and, where* the public body is a corporation sole, includes the person who is incorporated as such.

[162] The learned judge in that case held that the words 'and any person receiving any remuneration from public funds' has to be given a disjunctive reading in the definition because if it was intended that a person is to be regarded as an officer of a public body only if it is shown that he is both a member or officer of a public body and receives remuneration from public funds, then there would be no need for the words 'and any person' to appear in the definition. The learned judge held that their use indicates that they are meant to refer to persons not already referred to in the earlier part of the definition. In coming to that interpretation, Clement Skinner J (as he then was) referred to the dicta of Abdoolcader SCJ in *Dato Mohamed Hashim Shamsuddin v Attorney-General, HongKong* which we had alluded earlier.

[163] In this regard, we agree with submissions of the learned deputy that the use of comma before the words 'and includes' in the definition of 'director' in s 402A is highly significant. The comma followed by 'and includes' indicates that it refers to a different category of persons from the preceding one.

[164] As to the word 'includes' used in s 402A of the PC, we agree with the learned deputy's contention that when a statute employs the expression 'includes' to define some other words or expression, the intention is to leave the meaning of the expression defined open-ended. This was reiterated by Gopal Sri Ram JCA (as he then was) speaking for this court in *Tenaga Nasional Bhd v*

Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707; [2002] 3 CLJ 624:

> Particular emphasis is to be placed upon the word 'includes' in this definition. On settled principles of statutory interpretation, it is clear that when an Act of Parliament employs the expression 'includes' to define some other word or expression, the intention is to leave the meaning of the expression defined open-ended. By contrast when the word 'means' is employed to define something, there is a rebuttable presumption of statutory interpretation that Parliament intends to restrict the meaning of the expression defined.

[165] Hence, when both the words 'and includes' which follow a comma, are construed in the overall scheme of the definition of 'director', it is quite obvious that it is meant to be read disjunctively, thus giving rise to three separate categories of persons who are defined as directors for the purposes of this statutory definition. The second category of persons in that definition are often referred to as shadow directors, who by their very nature usually lurk in the shadow without any formal position in the company, seeking shelter behind the de jure directors, and seldom hold themselves out as directors of the company. They largely operate clandestinely and without showing their hands. But often when the evidence is closely scrutinised we will find their hidden hands directing and instructing the directors to act in the manner that the shadow directors want them to. However, in this case the appellant's hands were quite visible, and he was expressly and openly giving directions and instructions to the directors of SRC, which the directors became accustomed to follow. The evidence also shows that the appellant had supreme authority and control over SRC and its board.

[166] We also agree with the findings of the learned trial judge that the narrow interpretation of the definition of 'director' in s 402A of the PC being urged upon this court by the appellant would also go against this court's finding of criminal culpability on the part of a shadow director in *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697; [2007] 1 CLJ 326.

[167] The Court of Appeal in *Datuk Sahar bin Arpan v Public Prosecutor* found that the evidence in that case showed that the accused, an outsider to the company, was a shadow director of the company in question as the de jure directors were accustomed to act upon his instructions and directions. In that case the totality of the accused's conduct clearly fit the description of a shadow director. Although he was apparently an outsider, he was found to be in de facto control of the company and its decision making, and hence a shadow director. In coming to that finding the court adopted and applied the meaning ascribed to the term 'shadow director' by Millet J in the case of *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180:

> A de facto director, I repeat, is one who claims to act and purports to act as a director, although not validly appointed as such. A shadow director, by contrast, does not

claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others who, he claims, are the only directors of the company to the exclusion of himself. He is not held out as a director by the company. To establish that a Defendant is a shadow director of a company it is necessary to allege and prove: (1) who are the directors of the company, whether de facto or de jure; (2) that the Defendant directed those directors how to act in relation to the company or that he was one of the persons who did so; (3) that those directors acted in accordance with such directions; and (4) that they were accustomed so to act. *What is needed is first, a board of directors claiming and purporting to act as such; and secondly, a pattern of behavior in which the board did not exercise any discretion or judgment of its own, but acted in accordance with the directions of others*.

[168] Hence, to prove that a person is a shadow director in accordance to the principles enunciated in *Re Hydrodam (Corby) Ltd*, and as applied by this court in *Datuk Sahar bin Arpan v Public Prosecutor*, four elements need to be established, and they are:

(a) who the directors of the company are, whether de facto or de jure;

(b) that the accused directed or instructed those de jure or de facto directors how to act in relation to the company or that he was one of the persons who did so;

(c) that those directors acted in accordance with such directions; and

(d) that they were accustomed so to act.

[169] The principle enunciated in *Re Hydrodam (Corby) Ltd* is akin to that spelt out in the second limb/category of the definition of 'director' in s 402A of the PC, ie 'a person who acts or issues directions or instructions in a manner in which directors of a company are accustomed to issue or act'. Hence, the second limb of the definition of 'director' in s 402A is simply the statutory embodiment in the Penal Code of the concept of 'shadow director' that is explained in *Re Hydrodam* and which was applied by this court in *Datuk Sahar bin Arpan v Public Prosecutor*.

[170] It is worth noting that the concept of shadow director was revisited by the Court of Appeal in *Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd* [2019] 1 MLJ 495; [2018] 1 LNS 898 where Abang Iskandar Abang Hashim JCA (now CJSS) observed:

[18] ... And lastly, there is another sub-species that learned author Walter Woon, among others, would describe as a 'shadow' director. He had described this person as 'a rather sinister individual' who is 'in actuality a puppeteer. He pulls the strings and his puppets on the Board dance.' And if we may add, the puppets would not just dance, but they would dance to the music or tune of the puppeteer. But, this informal or de facto and shadow director are treated as a director under the CA 1965

for the purpose of attaching liability on them as by their conduct, the law attaches on them a fiduciary duty which they owe to the company which they seek to control or 'orchestrate' (see, Walter Woon, *Company Law* — (2nd Ed) Sweet and Maxwell Asia.) For a useful differentiation between a de facto director and a shadow director, see the judgment of Millett J in the case of *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 (High Court of England).

[171] Though *Sazean Engineering & Construction* involved a civil dispute, particularly in the context of company law, it is significant to note that the concept of shadow director is a general principle that is applied across both criminal and civil law, particularly company law. Our courts have applied the concept of shadow director both in criminal and civil law.

[172] In the premise of the above, we find that the learned trial judge had correctly concluded that the concept of shadow director is embodied in the definition of 'director' in s 402A of the PC, particularly the second limb thereof. We are in full agreement with that finding of the learned trial judge. It is obvious from the definition in s 402A of the PC, that an 'agent' includes a company director; and a 'director' is defined as not merely as one who is duly appointed and occupying the position as such but also 'a person who acts or issues directions or instructions in a manner in which directors of a company are accustomed to issue or act', ie persons who are generally termed as 'shadow directors'.

[173] The learned trial judge had also correctly found that the totality of the evidence adduced showed that the appellant was indeed a shadow director of SRC, and hence, a director within the meaning of s 402A of the PC. The evidence showed that the directors of SRC at the material time were appointed by the appellant as stated in his letter dated 1 August 2011. These were the de jure directors who were validly appointed to SRC's Board of Directors. Pursuant to article 67 of SRC's articles of association, the appellant, as the then Prime Minister, was the only person who can appoint and remove any director of SRC which meant that the appellant held the authority to hire and fire the de jure directors.

[174] There is also evidence showing the appellant having issued shareholder instructions which the directors of SRC had to follow, not merely as shareholder's instructions, but instructions issued by the Prime Minister who appointed those directors to office. Additionally, there is ample evidence showing that the directors had in fact followed the appellant's instructions and acted in accordance with them. There is no evidence to show the directors had disregarded or defied the appellant's instructions.

[175] The evidence also revealed that the directors were accustomed to act on the directions of the appellant, as it was he who had appointed them. This is clearly illustrated by the decision of SRC's Board of Directors to make a single full drawdown of the entire KWAP loan upon the instructions of the appellant, in contradiction to its earlier decision to drawdown the loan in stages when the funds were needed by SRC so that interest payment could be minimised. The earlier decision of drawdown in stages was a good commercial decision; however the Board yielded to the instructions of the appellant to make a single drawdown of the entire loan, which meant that SRC had to make much higher interest payments to KWAP. The de jure directors followed the appellant's instructions even though it was a bad commercial decision, which was not in the best interest of SRC.

[176] The testimony of PW39 showed that the appellant had control of the SRC's Board and dictated the usage of the funds of the company through shareholder instructions, which he himself signed. This is evident from the shareholder minutes that were tendered in evidence. The usual norm in the management of companies is that its affairs and day-to-day operational management were left to the board of directors. However, in SRC's case it was the reverse.

[177] The appellant was instructing the Board through shareholder minutes on SRC's operational and business aspects. The appellant was in fact the directing mind of SRC and took charge of the affairs of SRC. He gave instructions to the Board to divert the funds of SRC overseas, where the utilisation of the funds had nothing to do with the purpose for which SRC obtained the funds from KWAP, ie for natural resources development and strategic resources investment. In this regard, we agree with the learned trial judge's observation that the relationship between the directors and the shareholder in SRC does not follow conventional scenario and that it was the shareholder, namely the appellant, who directed the SRC Board on management issues; and that the SRC Board would resolve on company matters only after receiving shareholder minutes signed by the appellant.

[178] The learned trial judge also found that apart from being an agent by virtue of being a director, the appellant would also be an agent by virtue of the non-exhaustive definition of agent in s 402A that reads; 'acting for the company … in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or not'. This is said to arise from the appellant's position as Prime Minister, Finance Minister and Advisor Emeritus of SRC. In this respect the learned trial judge had analysed the arguments presented by the appellant and respondent and found as follows:

> [586] For the same reasons, it is also accurate to state that the accused could also fall within the definition of 'agent' in s 402A of the Penal Code by virtue of the words

'in any other capacity' as stated in the charges as the Prime Minister, Finance Minister and the advisor emeritus. This is in respect of his official role as the advisor emeritus of the company.

[587] Acting in his capacity as the Prime Minister even since the formation of SRC, the accused dictated the direction of SRC. The accused's capacity as a director under s 402A and advisor emeritus of SRC made him liable as an 'agent' under s 402A of the Penal Code.

[588] The accused was appointed as advisor emeritus only because the accused himself had granted his consent as the Prime Minister and as the sole shareholder of SRC representing MOF Inc for the company to amend its articles to insert the provision in the new article 117 on the creation of the position of the advisor emeritus with the powers as contained therein. This resulted again in the Board of Directors issuing a directors' circular resolution (exh 511) to adhere to the instructions. The accused dictated the direction of SRC from the time of its incorporation, given his roles as stated in the articles. His other roles as director as defined under s 402A and as the advisor emeritus all made him an 'agent' under s 402A of the Penal Code.

[589] I must reiterate that the accused was at all material times the Prime Minister and in that capacity was named in the M&A of SRC and given specific powers, including that of appointing and terminating directors of the company (P15). As correctly argued by the prosecution, the defence has admitted in its written submissions that the accused's power was superior to that of SRC in the sense that its Board of Directors required the approval of the accused before it could implement certain acts, and that the accused did undertake certain acts in exercise of his powers under the M&A. In that sense, it was the accused who was actually making decisions on behalf of SRC, exercising his powers vested in the M&A.

[590] I have also touched on the fact that s 402A of the Penal Code defines 'agent' widely, which also includes 'other officer of any company… or in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or not'. As I have stated, the words 'either alone or jointly' and 'whether in his own name or in the name of his principal or not' are manifest in excluding the requirement of there being a 'principal' as asserted by the defence.

[591] In my judgment, the evidence adduced by the prosecution has established that the accused was in fact the controlling mind behind SRC when he gave specific directions pertaining to the key aspects on the operations of SRC, principally as documented in the shareholder minutes discussed earlier.

[592] All the requirements to demonstrate that the accused was a 'shadow director' as formulated by either Millet J in *Re Hydrodam* (and subsequently referred to in the Malaysian Court of Appeal decisions in *Datuk Sahar bin Arpan v Public Prosecutor* and *Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd*) or the English Court of Appeal in *Deverell* which refined and made the concept of shadow director more expansive, have all been more than fulfilled, given the strength of the evidence before this court.

[593] And further, the definition of 'director' under s 402A too has been met by the evidence and in any event, this definition of director in s 402A is sufficiently wide

to admit of a shadow director in this case, both the *Re Hydrodam (Corby) Ltd* and the *Deverell* types. In short, as a director under s 402A of the Penal Code, the accused is thus an agent within the meaning of s 402A for the purposes of s 409 of the Penal Code subject to the three CBT charges against the accused.

[594] Thus, the law deems the accused to be a director within the meaning of s 402A of the Penal Code. It follows that the accused acted in his capacity as an agent within the meaning of s 409 of the Penal Code.

[179] We agree entirely with the above analysis and findings of the learned trial judge. Evidence adduced showed that the appellant arranged the affairs of SRC, whereby he was entrusted with its assets and properties. This is evident after his appointment as Prime Minister, where by virtue of that position he issued shareholder's instructions that had to be complied by the SRC Board. The appellant's role was formalised when he became Advisor Emeritus, by authorising an amendment to the articles of association that allowed for the creation of that position. This appointment entrenched the appellant's commanding position in SRC, which further enabled him to direct the SRC Board and act according to his command.

[180] Therefore, we find that the learned trial judge's acceptance of the respondent's argument that the appellant would be an 'agent' by virtue of the all-encompassing final part of the definition of 'agent' in s 402A of the PC — 'acting for the company … in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or not' is well placed and supported by a plethora of evidence. The appellant's cumulative role arising from his position as Prime Minister, Finance Minister and Advisor Emeritus, clearly shows him to be the directing and controlling mind of SRC. We do not find any error on the part of the learned trial judge in concluding, based on the evidence, that the appellant is an agent as defined under s 402A of the PC by virtue of him being a shadow director, and hence a director; and by his role in SRC by virtue of his position as Prime Minister, Finance Minister and Advisor Emeritus.

[181] The learned trial judge having found the appellant to be a director within the meaning accorded to it in s 402A of the PC, held that the appellant had the obligation to act in the best interests of the company, and hence the appellant is subject to the same duties and obligations of a director under the law.

[182] Learned counsel for the appellant submitted before us, as he did before the High Court, that even if the appellant is an agent by virtue of him being a director in accordance to its meaning ascribed to in s 402A of the PC, the prosecution must still establish the customary agent-principal relationship between the appellant and SRC. The learned trial judge considered this

argument in some detail and disagreed with the appellant's contention. This is what the learned trial judge said in his grounds of judgment in respect of this argument:

> [406] As I have stated, there is no requirement to prove the existence of a principal and agent relationship. In its argument to support its contention that the prosecution has not shown the existence of a principal and agent relationship, the defence has even admitted in its written submissions that the accused's power was superior to that of SRC in the sense that its Board of Directors required the approval of the accused before it could implement certain acts, and that the accused did undertake certain acts in exercise of his powers under the M&A. In that sense, it was the accused who was actually making decisions on behalf of SRC, exercising his powers vested in the M&A.
>
> [407] I must reiterate that the accused was at all material times the Prime Minister and in that capacity was named in the M&A of SRC and given specific powers, including that of appointing and removing the directors of the company.
>
> [408] For the same reason, there is no necessity for the prosecution to show that to qualify as an agent, the accused must be subservient to his principal, namely SRC. The accused had in fact on evidence acted in his own name, and not in the name of a principal when he himself signed all the shareholder instructions which were followed by the directors of the company.
>
> [409] SRC could not have been a principal of the accused because it was the accused who was the controlling mind of the company and its directors. His link with the company, and its Board was its own CEO and director, Nik Faisal. Evidence shows that the latter acted on the instructions of the accused, and did not gain anything from the funds of SRC. In contradistinction, the accused personally benefited from the RM42m of the funds of SRC which was deposited into the accused's personal bank accounts, the subject of the criminal charges against the accused.
>
> [410] In his capacity as the country's Minister of Finance, the accused was the shareholder of SRC by virtue of his position as Minister of Finance Incorporated under the law, the sole registered and legal owner of SRC upon the company being made a wholly-owned MOF Inc entity on 14 February 2012. Again the contention of the defence that any act of the accused in the above-mentioned position would not be an act 'for and on behalf' of SRC to qualify himself as an agent is fallacious, for there is no such condition to the applicability of s 402A. On the contrary, the accused's action was always 'for his own benefit' by using his position as the Minister of Finance to gain control of SRC and acted as the 'shadow director' of SRC or a director within the meaning in s 402A to direct the company directors to carry out his instructions.
>
> [411] Similarly, the cases referred to by the defence to show that shareholders are not agents of a company, while correct, are immaterial to the instant case. The accused had complete and overarching control over all things in SRC. He was a shadow director or a director under s 402A which makes him an agent under the same section, thus fulfilling the element of an agent for the purposes of s 409 of the Penal Code as framed in the three CBT charges against the accused.

[412] I cannot therefore but agree with the contention of the prosecution that if the definition of 'agent' as asserted by the defence was accepted, it would mean that any person who with authority acts (such as a shadow director or a director under s 402A) in a superior manner to company directors, cannot ever be held liable for offences under s 409 of the Penal Code.

[183] Further, the learned trial judge went into some depth in analysing the legislative intent in the amendment to the Penal Code that introduced s 402A of the PC and the statutory definition of the term 'agent' in s 409 of the PC and concluded that the definition of the term 'agent' does not require the prosecution to prove any agent-principal relationship. The learned judge concluded that the term 'agent' must be construed within the parameters of the statutory definition without imposing any addition requirements. In that regard, this is what the learned judge said:

Whether the definition of 'agent' imposes any such requirements

[413] I think regard must in this context be had to the provision of s 402A of the Penal Code itself. Its extent and scope must be appreciated. It provides a formulation of a wide-ranging definition of 'agent'. A careful reading of this lengthy definition of 'agent' does not in my view justify the interpretation ascribed by the defence which places a number of limits on who could qualify as an agent under this s 402A.

[414] Whilst the theoretical basis may still underpin the concept of agency which presupposes the existence of an agent and principal relationship, there is nothing in that statutory provision which imposes the other characteristics suggested by the defence. In fact, even the need to establish the existence of a principal and other aspects relating thereto is significantly diminished by these very words appearing at the end of the definition in s 402A — 'whether or not for a principal or not'.

[415] Neither has the defence referred this court to any case law authorities to support its construction of the term 'agent' — at least not in respect of its definition in s 402A or its equivalent, in the context of the offence under s 409 which is the basis of three of the criminal charges now faced by the accused.

[416] I should also add that the above-mentioned case referred to by the defence — the Supreme Court in *RK Dalmia v Delhi Administration* is based on the Indian Penal Code which does not have an equivalent provision to s 402A of the Malaysian Penal Code. And in any event as I have shown earlier, the Court of Appeal in *Periasamy Sinnappan v Public Prosecutor* did in its application of the former s 409 of the Penal Code discuss *RK Dalmia v Delhi Administration* but preferred the approach taken in the decision of the judicial committee of the Privy Council in *Cooray v R* [1953] AC 407.

[417] On an ordinary and literal interpretation of s 402A, it is plain that any of the capacities specified therein is, without more, an agent. There is no necessity to fulfil other requirements which are not there in the first place. After all courts cannot legislate. Indeed, in *Periasamy Sinnappan v Public Prosecutor*, Gopal Sri Ram JCA (as he then was) mentioned that *Cooray v R* is to be preferred over *RK Dalmia v Delhi*

Administration because otherwise it would tantamount to the court rewriting the very s 409 by means of an unauthorised legislative act.

[418] This court must therefore apply the definition of 'agent' in its clear, ordinary and unambiguous language as widely expressed in s 402A of the Penal Code without any necessity to read into this statutory provision other principles such as the law on agent-principal relationship. It would be wholly unwarranted. For much the same reason, the defence's reliance on the maxim of 'ejusdem generis' and 'noscitur a sociis' too is misconceived.

[419] In the Federal Court decision in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113; [2006] 3 CLJ 177 Augustine Paul FCJ in clear terms articulated thus:

> The primary duty of the court is to give effect to the intention of the Legislature as expressed in the words used by it and no outside consideration can be called in aid to find another intention (see *Nathu Prasad v Singhai Kepurchand* [1976] Jab LJ 340). Thus the duty of the court, and its only duty, is to expound the language of a statute in accordance with the settled rules of construction and has nothing to do with the policy of any statute which it may be called upon to interpret (see *Vacker & Sons Ltd v London Society of Compositors* [1913] AC 117; *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1987] 1 MLJ 39; [1986] 1 LNS 79) ...

[420] It is in any event trite that this is a long-standing position already entrenched in the law. The judicial committee of the Privy Council in a 19th century case of *Dyke v Elliot, The Gauntlet* (1872) LR 4 PC 184 had ruled that strict construction must be made of statutes which are penal in nature. These observations are most instructive:

> No doubt all penal Statutes are to be construed strictly, that is to say, the court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a cause omissus, that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.

[421] Furthermore, I cannot disagree with the submission of the prosecution which highlights what had been expressed by the relevant Cabinet Minister when tabling in Parliament the said 1993 amendments which refined s 405 and included a new s 402A of the Penal Code. An excerpt of the speech of Dato' Syed Hamid bin Syed Jaafar Albar in the Hansard on Wednesday, 4 August 1993 (at p 6293) reads as follows:

> Pindaan juga dibuat bagi memasukkan definisi baru seperti yang disebut dalam

> Fasal 5. Pindaan-pindaan tafsiran di atas dicadangkan dibuat untuk mengatasi masalah pentafsiran teknikal yang menjadi asas pelepasan mereka yang telah dituduh di mahkamah. Ianya juga bertujuan melengkapkan peruntukan yang sedia ada agar kelonggaran peruntukan perundangan tidak dipergunakan sebagai asas pelepasan mereka yang terlibat. Seperti yang telah disebut, peningkatan kesalahan-kesalahan jenayah kolar putih amat membimbangkan dan mungkin akan mengganggu-gugat kepentingan awam dan sekali gus pertumbuhan ekonomi negara.
>
> [422] It is plain from the Hansard that the rationale for the amendment to s 405 and the attendant introduction of s 402A is to overcome the technical interpretative difficulties then causing problems to the determining the true application of the law on the crime of CBT under s 405, as I have discussed in reference to the Court of Appeal decision in *Periasamy Sinnappan v Public Prosecutor*. The speech as recorded in Hansard states clearly that the changes were intended to rid the existing provisions of loopholes and uncertainties that could result in acquittals of persons charged with white collar crimes, which was on the rise, against the interest of the public.

[184] We fully agree with the learned trial judge's reasoning, and concur with his finding that there is no requirement for the prosecution to prove any agent-principal relationship once the appellant is established to be an agent within the meaning ascribed in s 402A of the PC; for example by establishing the fact of the appellant being a director of SRC, then he is an agent. There is no necessity for the additional requirement or burden on the part of the prosecution to show that there is an agent-principal relationship over and above that. If such a requirement was warranted Parliament would have expressly said so when s 402A of the PC was introduced into the statute books. In this regard, we concur with the learned judge when he said that, '… 'agent' in the context of a CBT offence under s 409 is specifically defined in s 402A in the same Code, and does not apply the traditional principal-agency relationship'. The meaning of the term 'agent' must be construed within the statutory definition of that term as found in s 402A of the PC.

[185] The appellant also contended that he was merely exercising his authority in pursuance of his official and representative capacity and thus his actions in that regard cannot be a basis to characterise him a shadow director. The learned trial judge rejected that contention after a detailed and careful examination of the arguments and case authorities cited. We too have rejected the contention. We do not find the learned trial judge's reasoning to be flawed. We agree with submissions of the learned deputy that the appellant did not execute his role as MOF Inc, quo shareholder, when he had in actuality micro managed SRC. The normal company governance structure allows for shareholders resolutions to regulate macro management affairs of the company and hence shareholders minutes are usually confined to the macro management aspect of the company's affairs and do not descend to the level of

dictating the day to day operations or micro-management matters, such as, where to open bank accounts, where to place the company funds, who the external auditors and solicitors should be. The appellant as MOF Inc, did not act within the scope of a shareholder's representative, but interfered with the Board's function and acted more like a shadow director, and by that as an agent within the wide meaning envisaged under s 402A. To this end, it must be noted that the appellant's role in directing the affairs of SRC through instructions to the Board members was not merely confined to him acting through MOF Inc, as its shareholder, but also as the Prime Minister and Advisor Emeritus as provided in the articles of association, whose authority in SRC was not based on the appellant wearing the MOF Inc shareholder's hat, but independent of that. The actions of the appellant that the prosecution contends which go towards establishing the ingredients of the charges was executed by the appellant wearing different hats as PM, FM, MOF Inc and Advisor Emeritus, which entrenched his commanding position in SRC, which in turn enabled him to direct the SRC Board as its overall master. Hence, we agree that the court will have to look at his collective actions carried out in these various roles and capacities as a whole without any artificial demarcation of the roles to ascertain if he was an agent as defined in s 402A of the PC.

[186] In this regard, the learned trial judge considered the argument of appellant in some detail before rejecting it:

> [520] There is this argument that an exercise of a statutory authority, such as in this case where the accused represented MOF Inc in having issued those shareholder resolutions could not be a basis to found the presence of a shadow director. I disagree.
>
> [521] First, the shadow director or director under s 402A in this case is established not purely by reason of the shareholder resolutions but also having regard to the entire circumstances of this case which crucially featured the governance structure which uniquely concentrated the powers of the Prime Minister in hiring and firing the directors, advisor emeritus in giving advice on investment and strategy matters to the directors and the Finance Minister as MOF Inc as the sole shareholder with absolute shareholder related authority issuing resolutions to the director, in a single person who was the accused.
>
> [522] Secondly, on closer scrutiny, it is questionable whether the alleged exercise of shareholder authority by the accused as the Finance Minister was beyond reproach. It is clearly evident from the shareholder minutes that, instead of allowing the directors to conduct the business and operation affairs of SRC, the accused basically remotely took charge of the company and gave specific instructions to divert the funds of the company overseas, specifically to Dubai, Hong Kong and Switzerland. But significantly, as mentioned earlier, the placement of these funds overseas had nothing to do with the purpose for which SRC had borrowed the RM4 billion from KWAP — which was specifically for strategic natural resources development for the nation.

[523] Thirdly, despite being an MOF Inc company, SRC was not run like one. The division responsible for overseeing MOF Inc owned companies did not have oversight over SRC. Attempts to appoint a representative from the Government on the Board of Directors of SRC could never materialise. This was the evidence on Datuk Fauziah Yaacob (PW53), a Deputy Secretary General of the Treasury. This was strongly supported by the testimony of Datuk Seri Haji Ahmad Husni bin Mohamad Hanadzlah (PW56) who was the Second Finance Minister at the material time whose initiative to travel to Switzerland to verify the status of the funds of SRC held in BSI Bank in Lugano was rejected by the accused who refused permission. More tellingly, PW56 was told by the accused on no uncertain terms not to interfere with or get involved in SRC and 1MDB.

[524] Not only that. Evidence by officers of MOF such as PW41, PW43, PW44 and PW45 painted a clear picture of MOF Inc being managed in a 'top-down' approach instead of the more usual 'bottom-up' approach. Instead of relevant recommendations being prepared and worked on by the relevant departments in the MOF, to be eventually submitted to the Finance Minister for approval, here the Finance Minister was the one who started and oversaw the process.

[525] After all, it needs no reminding that SRC is owned not by the accused personally but MOF Inc on behalf of the Government of Malaysia. Surely, any such resolutions by the shareholder must be for the benefit of the government and not for the benefit of the accused personally. The actions of the accused ultimately resulted in the default by SRC of the RM4 billion loans taken from KWAP, resulting in further financial loss to the government.

[526] The issuance of shareholder minutes directing the Board of Directors on actions to be taken by SRC establishes that given the evidence in this case, the accused was a director under s 402A of the Penal Code and thus an agent as defined in the same s 402A.

[527] The accused could not be said to be acting in the best interest of MOF Inc. Surely it could not have been since SRC did not pursuant to the shareholder resolutions issued by the accused utilise the RM4 billion loan for the purpose for which it was granted and had nothing to show for in respect of the government guaranteed loan. This was clearly confirmed by the former Secretary General of the Treasury himself, Tan Sri Wan Abdul Aziz (PW45). The defence was not able in its cross-examination of PW45 to point to a single project that was completed by utilising the RM4 billion loan given to SRC. The loans were simply unaccounted for.

[528] What this means is further clarified by the testimony of the lawyer who attended to the financing transactions. The evidence of Mohd Shuhaimi Ismail, the lawyer who drafted the documentation for the financing by KWAP to SRC (PW48) stated that the total amount of the loan to be repaid to KWAP by the Government of Malaysia by virtue of the government guarantee which resulted from SRC's inability to repay the principal of the loans, together with accumulated interest had increased to RM9.2 billion.

[529] In my view, the evidence led at the trial as I have referred to, established that the accused via principally the shareholders' resolutions, but also by way of other

directions, had issued directions and instructions in a manner in which the Board of Directors of SRC was accustomed to issue. This squarely puts the accused within the definition of a director under s 402A of the Penal Code. The accused is also a shadow director given his influence and control over the Board of SRC which evidence has shown were accustomed to act in accordance with the directions of the accused. As a director in both contexts (as per s 402A and as a shadow director), it necessarily therefore follows that the accused had acted in his capacity as an agent within the meaning of s 409 of the Penal Code.

[187] We fully concur with the above findings of fact made by the learned trial judge and his application of the law to the facts. The learned judge had analysed the evidence in some detail and concluded that unlike the usual government linked companies, where the management is bottom-up, the management structure of SRC was more top-down where, the evidence showed that instead of the usual manner in which relevant recommendations were prepared and worked on by the relevant departments in MOF, to be processed upwards through its layers to be ultimately submitted to the Finance Minister for approval, in SRC it was the appellant as Finance Minister who initiated and oversaw the process. The learned trial judge had thus correctly concluded that the appellant was not merely exercising a statutory authority when issuing his shareholder instructions to the SRC Board but was a director within the meaning ascribed to it by s 402A of the PC and therefore the appellant had acted as an agent within s 409 PC. He was the controlling mind of the company.

Second ingredient — Whether there is entrustment/dominion?

[188] The second ingredient of the offence under s 409 of the PC is the element of entrustment with property or with any dominion over property. There can be no criminal breach of trust unless the prosecution proves that the accused was entrusted with property or entrusted with dominion over property, which is the subject of the charge. The learned trial judge correctly ruled that the distinction between entrustment with property and entrustment with dominion over property is a matter of the degree of control one has over the property. Entrustment with dominion can be satisfied by the exercising of sufficient control over the property, for example, granted under a contract of employment. See: *Sinnathamby v Public Prosecutor* [1948–1949] supp MLJ 75. A general degree of control is sufficient rather than exclusive or sole dominion over the property. See: *Public Prosecutor v Cho Sing Koo & Anor* [2015] 4 MLJ 689; [2015] 4 CLJ 491. However, mere dominion over property without entrustment is insufficient. There must be evidence of prior entrustment before dominion. This was reiterated by the Federal Court in *Public Prosecutor v Lawrence Tan Hui Seng* [1993] MLJU 657; [1993] 4 CLJ 221.

[189] This was well explained by the learned trial judge in his grounds of judgment:

> [597] The term 'entrustment' may be defined simply to refer to a situation where a property owned by A is handed over to B, who holds the property in trust (in a broad sense and not in equity) for A. But elucidation on some fundamental aspects on entrustment is however apposite for present purposes.
>
> [598] Based on the drafting of s 405, first, a person may be entrusted either with property or with 'dominion' over property. The rationale behind this is not difficult to appreciate. Thus even if a person is not entrusted with the property itself, he may exercise de facto control.
>
> [599] The distinction between entrustment with property and entrustment with dominion may be exemplified by the person who has overall control of an operation and another who has day to day control of merely an aspect of the operation. It can generally be construed that the former is entrusted with dominion whilst the latter, with property. Ultimately, however the determinant calls for the resolution of a question of evidence on the degree of control exercised by an accused.
>
> [600] This may be illustrated in *Sinnathamby v Public Prosecutor* [1948–1949] supp MLJ 75; [1948] 1 LNS 160, where an employee at a quarry had left behind some stone which made possible their unauthorised removal by another party, which did happen. The High Court ruled that the employee had been entrusted with dominion because notwithstanding his superior had overall responsibility, the employee was in a position, by virtue of his contract of employment, to exercise sufficient control which satisfied the element of 'dominion'.
>
> [601] Secondly, this is also consistent with the provision of s 405 which also states that a person may be so entrusted 'either solely or jointly with any other person'. This must mean that first, a general degree of control is sufficient and secondly, there is no necessity to show exclusive or sole dominion. In *Public Prosecutor v Cho Sing Koo & Anor* [2015] 4 MLJ 689; [2015] 4 CLJ 491 on the issue pertaining to the ingredient of entrustment with dominion over property, it was held in the judgment written by Abdul Rahman Sebli JCA (as he then was):
>
> > [16] In her judgment the learned sessions court judge found that the respondents had no exclusive power or dominion over Ganad Media's funds as such power was in the hands of PW2, being the chief executive officer and the 'brain and mind' of the company. She described PW2 as the most powerful person in Ganad Media.
> >
> > [17] The learned sessions court judge used such words as 'ekslusiviti dan/atau dominasi', 'ekslusif kuasa', 'dominasi kuasa penuh', 'kuasa ekslusif' in determining whether the respondents had dominion over Ganad Media's funds. We consider this to be a misdirection. In a prosecution under s 409 of the Penal Code it is sufficient for the prosecution to prove dominion by establishing control or power of disposal over the property. There is no requirement to prove dominion to the exclusion of all other persons.

A [602] Thirdly, case law authorities have established that entrustment with dominion over property requires that there must be prior evidence of entrustment before dominion. Dominion without entrustment, vis a vis the property, will not do.

B [603] In the Supreme Court decision in *Public Prosecutor v Lawrence Tan Hui Seng* [1993] MLJU 657; [1993] 4 CLJ 221 (which followed the decision of the Supreme Court of India in the case of *Velji Raghavji Patel v State of Maharashtra AIR* [1965] SC 1433), Edgar Joseph Jr SCJ, who delivered the judgment for the Supreme Court authoritatively made this point clearly in the following terms:

C > Clearly, under s 405, the very first ingredient which the prosecution must prove is that the Accused was either entrusted with the property the subject of the charge or was entrusted with dominion over that property. In the case of entrustment of dominion over that property, the mere existence of that person's dominion over property is not enough. The prosecution must go further and show beyond reasonable doubt that his dominion was the result of entrustment

D > or, in other words, that the term 'entrustment' in s 405 governs not only the words 'with the property' immediately following it but also the words 'or with any dominion over the property' occurring thereafter.

E [604] And fourthly, s 405 also speaks of one who is 'in any manner entrusted with property'. This means that entrustment must not, for example, necessarily arise from any fraudulent conduct of an accused. This was borne out clearly in a case referred to by the prosecution in its written submissions, being a decision of the Supreme Court of India in *The Superintendent and Remembrance of Legal Affairs, West Bengal v SK Roy* AIR 1974 SC 794 which stated:

F > 12. To constitute an offence under s 409, Indian Penal Code it is not required that misappropriation must necessarily take place after the creation of a legally correct entrustment of dominion over property. The entrustment may arise in 'any manner whatsoever'. That manner may or may not involve fraudulent conduct of the accused. Section 409, Indian Penal Code covers dishonest misappropriation in both types of cases; that is itself fraudulent or improper and

G > those where the public servant misappropriation what may have been quite properly and innocently received. All that is required is what may be described as 'entrustment' or acquisition of dominion over property in the capacity of a public servant who, as a result of it, becomes charged with a duty to act in a particular way, or, at least honestly.

H [605] And because of such language in s 405, nor is it the requirement of the law that the entrustment of the property must be made directly by its owner to the accused. The Court of Appeal in *Aisyah bt Mohd Rose & Anor v Public Prosecutor* [2016] 1 MLJ 840; [2016] 1 CLJ 529 made this abundantly plain where Her Ladyship Tengku Maimun Tuan Mat JCA (now Chief Justice) stated thus:

I > [37] We accept that the first appellant was not entrusted directly with the cheques by the companies but it cannot be denied that through the intermediaries, the cheques ended up with the second appellant and from the second appellant, to the first appellant. In our view 'in any manner entrusted' is wide enough to encompass not only the property being directly entrusted by the

owner to the accused but also property entrusted by the owner to the accused indirectly, as in the instant appeal, entrusted to the first appellant by virtue of her position as an agent of the bank. A

[38] We find support in the case of *Som Nath v State of Rajashtan* [1972] AIR SC 1490 which states: B

> Section 405 merely provides, whoever being in any manner entrusted with property or with any dominion over the property, as the first ingredient of the criminal breach of trust. The words 'in any manner' in the context are significant. The s. does not provide that the entrustment of property should be by someone or the amount received must be the property of the person on whose behalf it is received. As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property to be applied in accordance with the terms of entrustment and for the benefit of the owner. The expression 'entrusted' in section 409 is used in a wide sense and includes all cases in which a property is voluntarily handed over for a specific purpose and is dishonestly disposed of contrary to the terms on which possession had been handed over ... C D

[42] Even if the submission of learned counsel is to be accepted that the element of 'entrusted with the property' was not proven, we find that the first appellant clearly had dominion over the cheques. In *Sinnathamby v Public Prosecutor* [1948–1949] supp MLJ 75; [1948] 1 LNS 160 the principle on dominion is stated as follows at p 76: E

> ... applies not merely in cases where the exercise or possession of dominion over property is one of the legal incidents of the contract of service but in every case where by virtue of the existence of contract of service the accused person is in fact in a position to exercise dominion. F

[43] In the present appeal, we are satisfied from the facts that the first appellant had dominion over the cheques. Without such dominion, the first appellant would not be able to do what she had done in terms of processing the crossed cheques which eventually led to the crediting of the cheques into the third party's account. G

[190] We find that the law set down by the learned trial judge on the element of entrustment of property and entrustment with dominion over property is entirely correct. H

[191] Learned counsel for the appellant contends that entrustment with dominion over property has not been established by the prosecution. And in particular counsel submits that: I

(a) that it was the board of directors who was exclusively entrusted with dominion over the affairs and funds of SRC and not the appellant. The

directors did not act blindly in accordance with the instructions of either the Prime Minister, Finance Minister, MOF Inc, or the Advisor Emeritus. The board of directors acted in accordance to their absolute decision-making power and did not follow the dictates of the appellant;

(b) the appellant as the Prime Minister, Advisor Emeritus or the Finance Minister was not entrusted with dominion over the funds of SRC; and

(c) the prosecution did not establish that the RM42m depicted in the three s 409 of the PC charges were funds belonging to SRC nor did it establish any entrustment or dominion over the RM42m by the Prime Minister, Advisor Emeritus or Finance Minister.

[192] The learned deputy on the other hand submits that the findings of the learned trial judge that the element of entrustment had been proven by the prosecution is well founded and that it is supported by overwhelming evidence. The learned deputy further submits that entrustment is derived from two sources, namely:

(a) first, the M&A itself gives the Prime Minister power to appoint the directors to manage the company, and hence the appellant became entrusted with dominion over SRC's property from the inception of SRC; and

(b) second, by virtue of the appellant's capacity as the shareholder of the company through MOF Inc, the appellant became entrusted by the ultimate shareholder of MOF Inc, namely the Government of Malaysia, to act as the corporate representative of MOF Inc. The appellant's control over all activities of SRC was thus complete. Such control was exercised by the appellant at both levels of power in SRC, that is by control of the board of directors and the shareholder.

[193] The same arguments raised before us were raised also by the appellant before the High Court. The learned High Court judge was of the view that if a duly appointed director is a fiduciary for the company, then the same holds true for a shadow director like the appellant and held:

> [608] CBT offences could arise from many different factual situations. Evidence must be led in all cases to show that an accused has been entrusted with the property in question. And this, in turn, depends very much on the capacity and role of the accused in the organisational structure vis a vis his control, if any, over the relevant property of the entity. The illustrations in s 405 of the Penal Code tell of entrustment of properties on the part of an executor of wills, a warehouse keeper, an investment agent, a clerk and a carrier. Certain positions however, such as company directors would invariably carry the responsibility over the preservation of company assets by virtue of their statutory duty of managing the business and affairs of the company (see for example s 131B of the Companies Act 1965).

> [612] Clearly, if a duly appointed director is a fiduciary for the company, and has all the powers of management which must extend to the control of properties belonging to the company (typically documented, for examples, in the company's articles of association and in directors' resolutions authorising directors as signatories for the company's bank accounts and for agreements on purchase and sale of properties) the same holds true for a shadow director like the accused who can influence or control the Board of Directors or a person also like an accused who in fact had issued directions in a manner in which the directors were accustomed to issue within the meaning ascribed to 402A of the Penal Code.

[194] As was reiterated by this court in *Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd* [2019] 1 MLJ 495; [2018] 1 LNS 898 a shadow director is treated as a director under the Companies Act 1965 for the purpose of attaching liability as the law attaches on him a fiduciary duty which he owes to the company which he seeks to control. And in any event the definition of 'director' in s 402A of the PC, which as discussed earlier includes shadows directors, is applicable in respect of offences of criminal misappropriation of property (ss 403–404), criminal breach of trust (ss 405–409B) and cheating (ss 415–420).

[195] The promoters and first two directors of SRC, which included Nik Faisal, incorporated articles 67 and 116 empowering the Prime Minister to appoint and remove the directors of SRC, and to require consent of the Prime Minister before any amendments to the M&A could be effected, which entrenched the appellant's position as a shadow director. This, the learned trial judge concluded grants authority to the appellant and gave the appellant dominion over the assets and properties of SRC. He held:

> [606] In my judgment, for the second element of the offence of CBT for the three charges, that is entrustment with dominion over property, for substantially the same reasons concerning evidence on the finding of the controlling position of the accused as a shadow director and as a director as defined under s 402A of the Penal Code, I also find that the accused had the entrustment with dominion over the property of SRC.

[196] The evidence shows that when SRC was formed as a subsidiary of 1MDB, the promoters of the company, namely, Nik Faisal and Vincent Koh Beng Huat, had obtained the appellant's approval to appoint the appellant and empower him in his capacity as the Prime Minister through articles 67 and 117 of the M&A to not only appoint and remove directors, but also ensured that no amendments to the M&A could be effected without the approval of the Prime Minister. The M&A was drafted and structured to give sole power to the Prime Minister, who at all material time was the appellant, to exercise his control over SRC as only he could appoint or remove the directors of the company. The appellant was clearly a party to the M&A as he could only be named in the M&A with his express approval to the promoters of the company. The

promoters named the sitting Prime Minister in their M&A with his consent. This is highly unusual and is an unique instance where the elected head of the government is given such authority to manage and operate the affairs of a private limited company incorporated under the Companies Act 1965 from its very incorporation. And subsequently article 117 was introduced where the purpose was to create a new position for the appellant, ie Advisor Emeritus. This position provided additional powers to the appellant where the SRC board of directors had to seek the advice and implement the advice of the Advisor Emeritus. This was in addition to the appellant's powers to appoint and remove any director of SRC. The appellant had agreed to the additional new articles in writing (P512), ie to his appointment as Advisor Emeritus. This cumulatively shows that the appellant's role was planned, deliberate and premeditated to use SRC to achieve some gain or benefit for himself. If SRC was purely a corporate vehicle to carry out the government's investment plans, then there is absolutely no need for such a corporate structure. It would have been left to the professionals and civil servants in MOF Inc, and the Finance Ministry to manage and handle the company.

[197] In this regard the learned trial judge analysed the facts and quite correctly found as follows:

> [626] The accused's control over all matters of SRC is all-embracing. SRC is only a private limited company but it was no ordinary company. As the Finance Minister, the accused in the capacity as MOF Inc was the sole shareholder of SRC. The various shareholder resolutions of the MOF Inc were followed by and formed the basis of many of the directors' resolutions of SRC. As the Prime Minister, the accused was named in the articles of the company as the only person empowered to appoint or dismiss any member of the Board of Directors of SRC as well the only person authorised to amend the articles of the company. Pursuant to the shareholder resolution issued by MOF Inc and signed by the accused dated 23 April 2012 (P510) the direction was to incorporate the new article 117 into the M&A of SRC. Since this involved an amendment to the articles, the consent of the accused as the Prime Minister, was necessary, and a letter of consent was issued by the accused as the Prime Minister, under article 116 (P512). And article 117 itself is about the creation of the position of an advisor emeritus of SRC for the accused as the Prime Minister.
>
> [627] This required the directors of SRC to seek the advice of the advisor emeritus on all material and strategic matters concerning the company. PW39 the former chairman testified that with this new position, the accused had full control over all aspects of the running of the company. PW42, another former director of the company testified that the insertion of article 117 changed the make-up of SRC because in order to operate, the instruction of the accused must be received by the directors. In the corporate governance structure of SRC, the true control and ultimate power vested in the accused and no other. The law would therefore consider the accused to have been entrusted with full dominion over SRC including its property, even from its establishment.

> [628] With such extensive degree of control reposed in the accused making him, as stated earlier, a shadow director or a director within the meaning ascribed to it under s 402A of the Penal Code, as well as an agent of SRC in his capacity of the Prime Minister and advisor emeritus as named in the articles, and as the Finance Minister, all similarly as defined under s 402A, the accused was thus entrusted with dominion over the properties of SRC, including the RM42m specified in the three CBT charges. For clarity I reiterate that as held by the Court of Appeal in *Aisyah bt Mohd Rose & Anor v Public Prosecutor* [2016] 1 MLJ 840; [2016] 1 CLJ 529, it is immaterial whether the requisite entrustment is established directly or indirectly, for the accused here plainly had control over the company which must include having dominion through the directors over the company's properties and funds as well.
>
> [629] His control and dominion over all activities of SRC were both total and complete. Such control and dominion were exercised by the accused at both the decision-making organs of a company, namely through its Board of Directors and as its sole shareholder. And with such control and dominion, including over the assets and properties of SRC, entrustment came into the picture by the operation of law.

[198] We agree with the learned judge's finding that the appellant's control and dominion over all activities of SRC were both total and complete. This governance structure made possible the overarching control that the appellant had over SRC. The ultimate shareholder of SRC is the Government of Malaysia, of which the appellant was at the material time the executive head. The appellant who was also the Finance Minister at the time, was by operation of law MOF Inc, and thus the acts of MOF Inc were the acts of the appellant. The appellant was wearing many hats, and these positions vis a vis the company gave him ultimate and overarching control over SRC. In this unique corporate governance structure of SRC, it cannot be denied that the true control and ultimate power vested in the appellant and no other. Thus, we concur with the learned judge's conclusion that the 'law would therefore consider the appellant to have been entrusted with full dominion over SRC including its property, even from its establishmen't.

[199] The appellant's position as the Finance Minister, and thus MOF Inc, made him the corporate representative of the government in SRC. Further, his role in SRC by virtue of his position as Prime Minister and Advisor Emeritus imposed upon him a legal duty to protect and preserve the interests of MOF Inc in SRC. In this regard, we agree with the learned trial judge's observation that:

> [631] The element of entrustment over the property of SRC or over dominion over such property on the part of the accused was particularly manifest, if not additionally onerous, because his control over SRC arose from his official and representative public office capacity. The articles in M&A named the Prime Minister as having the relevant requisite authority as was the Prime Minister being appointed as the advisor emeritus of the company. The accused was not personally

named in the articles. Similarly, his control over the shareholding of the company arose from the MOF Inc being its only shareholder and under the law, the Finance Minister is MOF Inc. Again, the accused was not specified as the shareholder by name.

[632] All these further fortify the assertion that given that the accused's overarching control of SRC (inclusive, necessarily of his dominion over the assets and properties of the company) arose from his official and public office representative capacity, the same must be exercised not only in the interest of and for the benefit of SRC as the true legal owner of the assets and properties of the company, but also for the purpose of safeguarding the interests of the government and by extension, the citizens of the nation, taking into account his role as the Prime Minister as named in the articles, as well as the Finance Minister, being the shareholder (MOF Inc) of the company.

[200] The learned trial judge had considered in some detail the issues raised by the appellant in contending that the element of entrustment with dominion over property had not been established. Firstly, the appellant argued that it was the Board of Directors of SRC who had been entrusted with exclusive control over SRC's properties, to the exclusion of the appellant. The learned trial judge rejected that contention and held that on the evidence it is difficult to accept the appellant's argument that the appellant was not in a position to exercise control over the properties of the company, including the RM42m.

[201] We agree with the learned trial judge's finding that the appellant's assertions on the application of the law on entrustment under s 405 are flawed. The entrustment of the property need not be exclusive as s 405 itself provides that entrustment can be made jointly. This court has in *Cho Sing Koo* emphasised that entrustment need not be exclusive. Therefore, the fact that the directors of SRC still retained their usual control of the company in the exercise of their statutory and fiduciary duties, does not negate nor diminish the appellant's joint and concurrent control over SRC.

[202] Additionally, this court in *Aisyah bt Mohd Rose & Anor v Public Prosecutor* [2016] 1 MLJ 840; [2016] 1 CLJ 529 has also held that the words 'in any manner entrusted' in s 405 means that entrustment for the purposes of an offence of criminal breach of trust can also be made out if the property is entrusted by the owner to the accused indirectly. Hence, the concluding remarks of the learned trial judge that '... it does not matter if like what had happened in this instant case, the entrustment came about not directly from the owner that is SRC but instead in a more indirect fashion through the enabling powers as contained in the constitution of SRC, as well as the shareholder of SRC ...' are well within the trite principles of the law. This is especially so when all of these were a result of a series of official endeavours approved by the appellant himself to entrench himself with such overarching control over SRC and its properties.

[203] As explained earlier, the appellant had overarching control of the company through entrenched powers in the M&A to hire and fire the directors (as the Prime Minister), the exercise of which by the appellant is apparent from the various directions involving Nik Faisal had shown, coupled with the appellant's directions to the directors through the various shareholder minutes (as the Finance Minister), and the advice on strategic and important matters which must be sought by the directors from the appellant (as the Advisor Emeritus).

[204] Being a MOF Inc company, SRC was placed under the control and direction of the MOF. The evidence of Dato' Fauziah Yaacob (PW53), the then Deputy Treasury Secretary General, shows that SRC was supposed to be placed under the supervision of MOF Inc, which is handled by the Bahagian MKD ('MOF Inc Division') in the MOF. This is normally done by placing officers of MOF onto the board of directors of all MOF Inc companies in order to advise and determine the direction of the company in compliance to the rules and regulations of MOF in force at any time.

[205] PW53 further testified that out of all the MOF Inc companies, only two never had an MOF officer on its Board and they were 1MDB and SRC. In fact, the M&A of SRC specifically prohibited government personnel/officers from sitting as members of the Board. Hence, the usual supervision by MOF was not possible even though SRC was an MOF Inc company. Despite requests and efforts taken by the Bahagian MKD and MOF to obtain information on the operations and status of SRC, none was provided by the Board. Obviously, the Board of SRC was operating independently of scrutiny by the Bahagian MKD, and that could have only been possible because of the role of the appellant in SRC.

[206] PW53 also testified that there was a recommendation made to appoint a representative of MOF onto the SRC Board and that a paper towards that end was prepared. The reason stated in that paper was that the MOF was still unclear on the business activities and investments of SRC. The paper and the proposal therein were done in 2015, which is more than three years after SRC had become a directly owned MOF Inc company. And yet MOF though tasked with the responsibilities of supervision over SRC were in the dark as to the activities of SRC for the three years since MOF Inc became its sole shareholder.

[207] The said paper containing the recommendation to appoint officers of the MOF onto the Board of SRC was then forwarded internally to Dato' Seri Husni Hanadzlah (PW56), who was then Finance Minister II. The proposal in the said paper was approved by PW56, however it could not be implemented as article 67 of SRC's M&A forbade government officers from sitting on the Board of SRC. The only way to get this done was to amend article 67, which

however would have required the approval of the appellant as provided in article 116. Alas, no such approval was forthcoming, and the reason for that is simply that the appellant wanted no one other than himself to be in control of SRC.

[208] PW56 further explained in cross-examination that SRC's matters were never referred to him for his consideration and deliberation. He explained that SRC and 1MDB had similar structures in both companies whereby in 1MDB, the appellant was the Chairman of the Board of Advisors, whilst in SRC the appellant was the Advisor Emeritus. Both these positions gave the appellant ultimate control over the two companies. PW56 also elaborated that as Minister of Finance II, all MOF Inc companies were to report to him, with the exception of 1MDB and SRC. He further testified that he had no control over these two companies although the Ministerial Functions Order in PU(A) 222/2009 clearly provides power to both Ministers of Finance to supervise them. He said that though he had the legal right to supervise SRC, he was prohibited by the appellant from exercising his supervisory role.

[209] These concentrated and domineering powers of the appellant in SRC, which he exercised to the fullest shows that the appellant was entrusted with dominion over the property of the company, not directly but through the directors of the company, who were his puppets on a string. He had controlling authority over the company that was secured through the directors of the company who had direct control over the properties and funds of SRC.

[210] This is manifested by the role of Nik Faisal in SRC and his connection to the appellant. The day-to-day running of the company, including all financial transactions of SRC, was conducted by Nik Faisal, who was at the material time a director and CEO of SRC. Nik Faisal had consistently represented to the directors of SRC that he was acting on the instructions of the appellant. This further shows the extent of the appellant's control over all matters related to SRC and its properties. The appellant's power to deal with the properties of SRC, including dealing with the funds of the company, arises from him being entrusted with dominion over the property of the company through his overarching control of the board.

[211] In this regard, we wholly concur with the following findings of the learned trial judge:

> [643] This overwhelming degree of control was exercised by virtue of his power as the Prime Minister as stated in the company's M&A, as the Finance Minister through the various shareholder resolutions issued by MOF Inc, which based on the testimony of PW39 and PW42 preceded and determined the resolutions resolved by the directors, and as the advisor emeritus of SRC as enshrined in article 117 of the M&A of the company.

[644] The corporate governance regime of SRC was at the material time quite unique, in light of the overarching powers exercisable by the accused personally at the various controlling levels. It is manifest that as a result, he had the requisite entrustment with dominion over the property of SRC. Both PW39 and PW42 testified that SRC was not run like any other normal company, but instead was in the full control of the accused. The M&A gives the distinct power to the Prime Minister to appoint or remove the Board of Directors and the CEO of the company, whilst these directors were under the law had accountability over matters related to the business and the investments of the company.

[645] It is no exaggeration for the prosecution to submit that it was very unusual for the Head of Government to have been vested with such vast authority to oversee and control the affairs of a private limited company incorporated under the Companies Act 1965. There was not a material action that SRC took which was not the result of a decision by the accused, whether as part of its management (de facto or shadow director or as a s 402A director) or as a shareholder in the name of MOF Inc.

[212] The appellant also contended that because SRC was an MOF Inc owned company, the position of the accused as the 'corporate representative' of MOF Inc does not create entrustment of the properties of SRC to the accused. The learned trial judge considered this argument in some detail before dismissing it. The judge's consideration of this argument is found in paras 653–658 of the grounds of judgment:

Whether representative capacity means there is no entrustment

[653] It is also erroneous to say that because SRC was an MOF Inc/MKD-owned company, the position of the accused as the 'corporate representative' of MKD or MOF Inc does not create entrustment of the properties of SRC to the accused. This is because, the directors acted on the shareholder minutes issued by the accused albeit in his capacity as the MOF Inc. Evidence shows the involvement of no one else in the process at MKD despite SRC being wholly-owned by MOF Inc.

[654] These were the instructions of the accused resolved at the paper general meeting of SRC, and the deemed meeting passed the resolution of a single person who was the accused in his capacity as the corporate representative of MOF Inc under the process set out under s 147(6) of the Companies Act 1965.

[655] As I have stated earlier, under s 3 of the Minister of Finance (Incorporation) Act 1957, the Minister of Finance (Incorporated) is the Finance Minister. It is not correct thus to say that the accused, as the Finance Minister is the corporate representative of MOF Inc. The accused, as the Finance Minister, was the MOF Inc.

[656] The corporate representative capacity was relevant only when the accused signed as the shareholder of SRC for the purposes of constituting a general meeting of a company with a sole corporate shareholder under s 147(6) of the Companies Act 1965. And since the shareholder like MOF Inc is a corporate entity, the provision requires a representative (meaning a natural person) of the corporate shareholder to sign the relevant resolutions which became the shareholder minutes.

A [657] So at the risk of repetition, even though the accused signed as a corporate representative of MOF Inc, that was in the context of the procedure for a general meeting, and effected to ensure compliance with the meeting process stipulated under the Companies Act 1965. It does not detract from the legal position that the Finance Minister is the MOF Inc. At the material time, it was the accused. This is
B unique and quite unlike other situations involving corporate representatives of companies to sign similar resolutions (or shareholder minutes) of the general meetings of their subsidiaries. There, commonly the corporate representative would be a director or senior executive of the holding company or shareholder. But for MOF Inc the statute says that the Finance Minister is MOF Inc.

C [658] Any apparent inconsistency in the various shareholder minutes is immaterial for the directors did give effect to the substance of the specific decisions of the shareholder contained therein. PW39 also testified that these shareholder minutes were consistent with P530 that had been previously shown to PW39.

D We concur with that decision as the fact of the matter is that the directors acted on the shareholder minutes issued by the appellant in his capacity as MOF Inc. In that capacity he was not a corporate representative in SRC, he was MOF Inc itself, which arose from his position as Finance Minister.

E *Are the RM42m the funds of SRC*

[213] The next related issue is whether the RM42m, the property which is the subject of the three CBT charges belonged to SRC. The appellant submitted
F that the prosecution must establish that the entrustment was for dominion over the funds amounting to RM42m which the charges allege the appellant misappropriated. Learned counsel for the appellant submitted that the appellant can only misappropriate what he is entrusted with, and referred to several authorities in support of that submission. There is no denying that the
G property must be that of SRC if the charge is to stand. And in this regard, it must be established by cogent evidence that the RM42m in the three charges belonged to SRC.

[214] The evidence clearly shows that the RM42m belonged to SRC. The
H money trail clearly records that the said RM42m originated from SRC's AmIslamic Bank account and transited through the bank accounts of GMSB and IPSB before being deposited into the appellant's personal bank accounts.

[215] The learned trial judge had also considered this argument in some detail
I and discussed it at length, before rejecting the argument entirely. This is found in paras 671–675 of the grounds of judgment:

[671] These transfers are more than abundantly confirmed in the bank statements of the accused's personal bank accounts (P270 for Account 880 and P110 for Account 906) which registered the crediting of the RM42m in these accounts, from

IPSB's account. I repeat that PW21, the bank manager at AmBank JRC branch and PW54, the relationship manager in charge of the accused's personal accounts confirmed that there was no report or complaint from the accused to the bank, nor was there any legal action taken by him in relation to the RM42m being deposited into his accounts.

[672] Further, the movement of the RM42m from SRC through GMSB and IPSB does not detract from the fact that it was SRC funds that were being diverted into the accused's personal accounts. The defence's contention that because the SRC funds had passed through GMSB to IPSB, SRC had divested itself of these funds in the sense that the RM42m that arrived into the accused's personal accounts could not therefore be considered as the funds of SRC is absolutely specious and untenable. After all, there is no reason for SRC to transfer its funds to GMSB in as much as there is no reason for GMSB to transfer 'its' funds to IPSB. None was offered.

[673] It is inescapable that these transfers were carried out in that fashion in order to avoid detection. This is further supported by the transfers being made on the same day for no apparent reason. And PW37 of IPSB testified that the funds did not belong to IPSB, but that IPSB was instead used as a conduit for the transfer of the funds to the accused's undisclosed accounts, which subsequently were discovered to belong to the accused. That PW37 was not apprised of the identity of the account holder is further indication that the purpose of the transfer was to avoid detection by SRC, GMSB, IPSB and the authorities.

[674] The accused was thus plainly entrusted with the properties of SRC, including all monies standing to the credit of SRC and the RM42m. Given his position of overarching control in SRC — particularly his position as a director under s 402A of the Penal Code and as a shadow director, the accused was entrusted with dominion over the properties, via the Board of Directors of the company.

[675] There is also an argument by the defence that the RM42m could not have been from SRC because all of its funds had been disbursed in 2011 and 2012. This is not supported by evidence. Above all, it is a spurious contention. For it is trite, as submitted by the prosecution, that all funds standing to the credit of SRC at any period of time and from whatever source are the property of SRC. Any funds debited out of SRC, being a loss to the company, goes towards completing the commission of the offence of CBT under s 409, not to mention the subsequent deposit of the funds into the accounts of the accused, which additionally would be a wrongful gain on the part of the accused.

[216] We find no reason to interfere with the above reasoning, nor the conclusion of the learned judge. The evidence trail clearly establishes the funds flowing from SRC, through intermediary companies that had no legal right to receive the funds, and ending up in the appellant's two personal accounts from which the funds were utilised by the appellant. The fact that the funds flowed through these intermediary companies do not necessarily mean that SRC no longer has a proprietary interest in these funds, nor does it mean that the funds do not belong to SRC. Evidence has established that the flow of these funds, ie

A the RM42m, through the intermediary companies, namely GMSB and IPSB, was for the purposes of layering the transaction and disguising the flow of funds such that it is made more difficult to track the funds' nexus to SRC and avoid detection by the authorities. The funds remain that of SRC despite flowing through these two companies. If such nefarious schemes of layering and
B camouflaging the flow of funds through multiple companies or individuals are to be construed to mean that the entity where the source of the funds had originated had lost its propriety interest in those funds, then those in control of these companies can easily misappropriate company funds and be beyond the reach of the law merely by layering the flow of funds. The courts cannot
C countenance that. In cases such as the present where both GMSB and IPSB did not have any interest or lawful reason to receive the funds, then the law would always consider such funds to belong to SRC. This is what the learned trial judge found and we agree entirely with that finding.

D **[217]** Thus, we find that the second element of the offence under s 409 of the PC, ie entrustment with dominion over property, has been proven, and the learned trial judge was correct to hold as such.

Third ingredient of CBT — Misappropriation

E

[218] The third key element of the CBT charges is whether the appellant being entrusted with dominion over the property of SRC, namely the amount of RM27m stated in the 1st CBT Charge, the amount of RM5m stated in the second CBT charge, and the amount of RM10m stated in the third CBT
F charge, had committed criminal breach of trust in respect of the same. It is well recognised that in law, CBT may be committed in five different ways, and they are, that the accused:

(a) dishonestly misappropriates the property;

G

(b) dishonestly converts it to his own use;

(c) dishonestly uses or disposes off the property in violation of any direction of law prescribing the manner in which such trust is to be discharged;

H (d) dishonestly uses or disposes of the property in violation of any legal contract made touching the discharge of such trust; and/or

(e) wilfully suffers any other person so to do either one of the aforesaid third or fourth mode of committing CBT.

I **[219]** Hence, it must be noted that as specified in s 405 of the PC, for each of the first four modes of the offence of CBT, dishonesty is an essential element that must be shown, and as for the fifth mode, it is 'wilful suffering'. During the course of oral submissions before us the learned deputy confirmed that in respect of the three CBT charges, the prosecution contention is that the

appellant committed them by the first two modes of the offence, that is: (i) that the appellant dishonestly misappropriated the property of SRC; and/or (ii) that he dishonestly converted it to his own use. The prosecution did not pursue the other modes. Thus, the prosecution, in establishing a case of CBT bears the onus of proving that any one of the acts or conduct of the accused stipulated in any of the first two modes were done dishonestly.

[220] The term 'dishonestly' is defined in s 24 of the Penal Code as:

> 24 'Dishonestly'
>
> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing 'dishonestly'.
>
> Explanation — In relation to the offence of criminal misappropriation or criminal breach of trust it is immaterial whether there was an intention to defraud or to deceive any person.

[221] It must be noted that the 'Explanation' in s 24 of the PC clarifies the statutory definition of 'dishonestly' when applied to an 'offence of criminal misappropriation or criminal breach of trust it is immaterial whether there was an intention to defraud or deceive any person'. The other important element of the definition is that for an act of misappropriation to be dishonest, the intention must be to cause wrongful loss or wrongful gain irrespective of whether the act did in fact caused actual wrongful loss or gain.

[222] In this regard, s 23 of the PC defines 'wrongful gain' and wrongful loss' as follows:

> 23 'Wrongful gain' and 'wrongful loss'
>
> 'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled.
>
> 'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled.
>
> A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

[223] Whether there is wrongful gain depends on whether a person obtained a property to which he is lawfully entitled. Wrongful loss occurs when a person legally entitled to a property is wrongfully deprived of the said property. This was very well explained by Raja Azlan Shah J (as HRH then was) in *Sathiadas v Public Prosecutor* [1970] 2 MLJ 241 in the following terms:

A The gist of the offence of criminal breach of trust is entrustment and dishonest misappropriation or conversion to own use. Once the prosecution have succeeded in proving the receipt of the money for a particular purpose the case of entrustment is made out. Dishonest misappropriation or conversion to own use involves wrongful gain to the appellant or wrongful loss to his employers for the period of the B retention of the money. That must depend on the facts and circumstances of each case. Criminal breach of trust is not an offence which counts as one of its factors, the loss that is the consequence of the act, it is the act itself, which in law, amounts to an offence. The offence is complete when there is dishonest misappropriation or conversion to one's own use, or when there is dishonest user in violation of a C direction, express or implied, relating to the mode in which the trust is to be discharged.

[224] Subsequent thereto, in *Chang Lee Swee v Public Prosecutor* [1985] 1 MLJ 75; [1984] 1 LNS 134, Gunn Chit Tuan J (as he then was) explained D dishonest intent in the following terms:

> On the question of whether there was any dishonest intention, I can do no better than follow the Federal Court in *Navaratnam v Public Prosecutor* and quote here this passage from the judgment of Fazl Ali J in *Harakrishna Mahatab v Emperor*:
>
> E > ... I must point out that the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intention or not. As the question of intention is not a matter of direct proof, the Courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had or had no mens F rea for the crime. So in cases of criminal breach of trust the failure to account for the money proved to have been received by the accused or giving a false account of its use is generally considered to be a strong circumstances against the accused.

[225] And later the Court of Appeal speaking through Gopal Sri Ram JCA in G *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557; [1996] 3 CLJ 187 held as follows:

> ... that the offence of criminal breach of trust is not an offence of strict liability. It is only an offence, under s 405 of the Penal Code, to convert, dispose or to appropriate H property done with a dishonest intention. To emphasise this important ingredient which forms the mens rea of the offence, we need do no more than quote from *Sir Hari Singh Gour's Penal Law of India* (10th Ed) Vol 4, p 3503 which reads as follows:
>
> I > The mere violation of law or a legal contract is, however, only one element for consideration. The essential element is dishonesty. The term 'dishonesty' has been defined before, and it has frequently been the subject of discussion. It has been used here in the same sense as in ss 378 and 403 as implying the intention of causing gain or loss by unlawful means of property to which a person gaining or losing is not or is entitled.
>
> ...

> In essence, the offence of criminal breach of trust is an offence relating to property and its commission is directed against the beneficial owner of that property. So, there can be no criminal breach of trust where the beneficial owner consents to the use of property in a particular way. That consent of the beneficial owner is a complete defence to the offence of criminal breach of trust is to found in the words 'in violation…of any legal contract, express or implied, which he has made touching the discharge of such trust'. The beneficial owner of property who entrusts it or dominion over it to another under an express or implied contract, for the purposes of s 405, must retain the ultimate control over its use or disposal …

As to whether there is in fact dishonest misappropriation should be inferred from the evidence and circumstances of the particular case. See: *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16.

[226] The learned trial judge concluded that the evidence adduced by the prosecution clearly shows that the movement of the RM27m, RM5m and RM10m from the SRC bank accounts were acts of dishonest misappropriation. The learned trial judge found that the appellant effected the misappropriation of the RM42m from SRC as the evidence adduced irresistibly points to that conclusion. This according to the learned trial judge is evident from the manner in which the funds were moved to the appellant's private accounts by layering the movement to avoid detection.

[227] More importantly, the learned judge found that there was no reason for the RM42m to be moved from SRC in that layered manner and for the funds to ultimately end up in the appellant's bank accounts. The circumstances that led to the learned trial judge's conclusion in this regard can be summarised as follows:

(a) the RM42m ultimately ended up in the appellant's personal bank account and was never diverted to any other account;

(b) the RM42m was utilised by the appellant;

(c) the transactions involving the RM42m involved close associates of the appellant namely, the late Dato' Azlin Alias and Nik Faisal who was not merely the mandate holder for the appellant's bank account but was the director and bank account signatory of SRC, and who was the link between the appellant and SRC's board of directors;

(d) as agent and mandate holder, Nik Faisal's instructions to AmIslamic Bank as regards the movement of funds in the appellant's bank accounts are deemed to be instructions of the appellant; and

(e) once the funds were received into the appellant's bank accounts, he utilised the funds by issuing several cheques. In the circumstance, the

A appellant would have knowledge of the funds being credited into the bank accounts, and would in law be responsible and accountable for the activities in his accounts.

B **[228]** The primary responsibility for the manner in which the bank accounts were operated vests solely with the account holder, in this case the appellant. This principle was reiterated by the Court of Appeal in *Yap Khay Cheong Sdn Bhd v Susan George a/p TM George* [2019] 1 MLJ 410; [2018] 5 CLJ 345 where Rohana Yusuff JCA (as she then was) observed:

C [22] The defendant as an account holder, has sole legal control and custody of her own bank account. It is accepted that no person can have any access to another person's account unless consented to. In this case, the defendant had allowed Tharvinder free access to her account and she should be held responsible for the outcome of her action. Since she had allowed Tharvinder to meddle with her
D account, in our view, she cannot absolve her responsibility by just feigning ignorance about what went on in her account.

This statement of law applies squarely to the actions of the mandate holder Nik Faisal, who was authorised by the appellant to operate his accounts. The
E appellant cannot feign ignorance of what went on in his account, and distance himself from the actions of his mandate holder. The instructions from Nik Faisal to AmIslamic Bank as the mandate holder are deemed in law to be the instructions of the appellant. The appellant cannot plead ignorance of the transactions in his bank accounts to avoid criminal liability. The customer of a
F bank is required by law to have knowledge of the banking activities in his account. In the present appeal, over and above that, the appellant's knowledge of the fund's movement into his bank accounts and his dishonest intention is borne out by the added evidence of him issuing the instruction letter dated
G 24 December 2014 (P277) to AmIslamic Bank and the timing of the arrival and usage of the funds.

[229] The appellant contends that the element of misappropriation has not been established by the prosecution, on account of the following:

H (a) the prosecution's case on misappropriation is untenable as the evidence reveals that the RM42m of SRC funds were in fact disbursed out by 16 scanned copies of instruction letters which were not executed by PW42 (being one of the signatories to the account) who denied knowledge of
I any financial transactions of SRC and GMSB;

(b) no case of misappropriation under s 409 of the PC can be made out if the instruments by which the funds in SRC's accounts were disbursed were forged or unauthorised;

(c) PW49's testimony was incredible in light of contemporaneous conversations recorded in Blackberry messages ('BBM') (P578), which was compounded by PW54's admission in this regard; and

(d) there were other inferences on probable causes of the transactions of the funds from the SRC accounts.

Scanned or electronic instructions to SRC using the cut and paste signatures of Nik Faisal and PW42

[230] The appellant argues that the use of cut and paste signatures of PW42 and Nik Faisal on the instructions to AmBank for the transfer of the funds out of SRC's bank accounts vitiates the transfers and that these transfers cannot be attributed to the appellant. Initially PW42 testified that the signatures on the letters of instructions to the bank were his signatures. However, in cross-examination when it was shown to him that the signatures were not written but were rather 'cut and pasted' on to the instruction letters, PW42 agreed with learned counsel for the appellant that they did seem to be cut and pasted and that he did not personally put his signature onto the instruction letters. These instruction letters were then scanned and transmitted to AmIslamic Bank for the funds to be disbursed from SRC's bank accounts.

[231] We concur with the findings of the learned trial judge that whether the signatures on the instructions were actual or digital; or whether they were scanned or electronic, it does not make any difference. In banking practice, scanned or electronic instructions bearing photocopied or digitised signatures of an authorised signatory is generally accepted, as confirmed by PW54. In this regard, we agree with submissions of learned counsel for the respondent that the bank can act on scanned or electronic instruction as long as the signatories agree to the transfer and for their sample signature to be used, and so long as all other requirements imposed by the bank in respect of such instructions are fulfilled.

[232] There is no dispute on the several SRC electronic transfer instructions to AmIslamic Bank as the bank is authorised to act on scanned signatures. This is further confirmed by the testimony of the Chairman of SRC's Board (PW39) where he stated that SRC had resolved via a Directors Circular Resolution (DCR) dated 23 August 2011 (exh D519) to allow for the use of electronic copies of instruction letters to transact funds with AmIslamic Bank, and AmIslamic Bank was mandated to act as such upon these electronic instructions. PW39 confirmed that based on the DCR, SRC was authorised to instruct AmIslamic Bank via email or other electronic means as regards transfer of funds from SRC's accounts.

[233] Additionally, it must be noted that in the present case, though the

A appellant has raised the issue of the validity of the electronically transmitted scanned instructions at trial, at no time did SRC, as the account holder itself, dispute the said instructions with AmIslamic Bank. And importantly, in accordance with usual practice, AmIslamic Bank had confirmed the scanned electronic instructions with officers of SRC, as well as GMSB, with their B respective finance officers, before acting on them. All transactions were acted upon by AmBank without any complaint as to the legitimacy of the instruction letters from SRC or GMSB. In this respect, there is also no evidence of any wrongful crediting or debiting of the accounts of SRC or GMSB by AmIslamic Bank as a result of the use of the cut and paste signatures of the authorised C signatories. SRC and GMSB being the customer/account holder had not complained of any wrongful transfer of the funds from their accounts. There was never any dispute between SRC nor GMSB, as customer, and AmIslamic Bank, as banker, in respect of AmIslamic Bank acting on the scanned instruction letters. This subsequent conduct of SRC/GMSB and AmIslamic D Bank after the transfers had been made pursuant to the customers' scanned electronic instructions would be a relevant consideration pursuant to s 8 of the Evidence Act 1950.

E **[234]** The appellant argues that a copy of the Directors' Circular Resolution (DCR) is not in AmIslamic Bank's custody and that this somehow negates or affects the mandate of AmIslamic Bank to act upon these electronic instruction letters. However, PW39 had categorically stated that SRC had vide the DCR given AmIslamic Bank the authority to act on electronic instructions. It would F be rather disingenuous of the appellant, who is not the account holder, to complain about the use of the cut and paste signatures of the authorised signatories when neither the signatories nor the companies are complaining. This is compounded by the fact that the appellant had received the funds emanating from these letters of instructions, and had enjoyed the full benefit of G these funds by spending all of it. The appellant's argument in this regard is demolished by his own witness DW2, a banker, who confirmed that there was never any complaint from SRC or GMSB towards AmIslamic Bank's actions in relation to its reliance on the scanned electronic instructions to transfer the funds. DW2 further confirmed that SRC by sending the scanned electronic H instruction letters and AmIslamic Bank acting on it without any dispute or complaint means that AmIslamic Bank was acting on the clear understanding that it had the customer's mandate to act on these instructions.

[235] Thus, we agree with the learned trial judge's finding that the I overwhelming oral and documentary evidence shows that the bank had acted upon valid transfer instructions from SRC, GMSB and IPSB to finally credit these funds into the appellant's account. The appellant never raised any complaint with the bank for these funds being wrongly credited into his accounts. He was quite contended to receive and utilise the funds to his liking.

It has never been shown that the utilisation of the funds had anything to do with SRC or its business. The learned trial judge took this to mean that the transfers into his bank accounts must have been done with the appellant's knowledge for otherwise he would not have spent the RM42m. The natural thing for any account holder who has mistakenly or inadvertently received funds into his account is to return it and correct the error. However, the appellant did not do any such thing. Thus, the entirety of the evidence fortifies the learned judge's inference that the appellant certainly had knowledge of the RM42m that was transferred into his account.

[236] If indeed the flow of the RM42m had been for commercial or business purposes related to SRC, then there would be no necessity for the funds to go through GMSB and IPSB. The learned trial judge concluded that these transit accounts served only to camouflage the origins of the funds and to avoid detection of the movement of the funds into the appellant's accounts. The flow of funds from SRC through GMSB and IPSB, as conduits, were clearly done to conceal the movement of funds from SRC to the appellant's accounts and make detection difficult. This in itself would show the dishonest element.

[237] The money trail of the RM27m under the first CBT charge, RM5m for the second CBT charge, and RM10m for the third CBT charge is well analysed by the learned trial judge in paras [687]–[721] of the grounds of judgment. The evidence clearly shows that the starting point or source of the RM42m is SRC's AmIslamic Bank account. The same modus operandi was used for all three transfers, whereby the funds from SRC's account were transferred to GMSB and IPSB, as mere layered conduits, before being finally deposited into the appellant's personal account. The learned trial judge had considered at some length the instructions by both Nik Faisal and PW42 that was sent to AmIslamic Bank authorising the transfers from SRC's account to GMSB, and then on to IPSB, before finally being deposited into the appellant's personal account. The documentary evidence, supplemented by oral testimony of the relevant witnesses from the bank, SRC, GMSB and IPSB is simply overwhelming. In addition to that the compelling testimony of Uma Devi Raghavan (PW21), the AmIslamic Bank Branch Manager at Jalan Raja Chulan Branch, and Joanna Yu Ging Ping (PW54), the relationship manager in charge of the appellant's personal accounts confirms the fact that the appellant did not at any time make any enquiries with the bank, or lodge any complaint, regarding the huge amounts of funds going in and out of his accounts. Neither did the appellant take any action against AmIslamic Bank, up till the time of the trial, for their alleged wrongful debiting of his accounts when the withdrawals took place.

[238] The next all important question, is therefore, did the accused effect the misappropriation. Though the learned trial judge found that there was a lack of

direct or specific evidence showing that the appellant gave instructions for any of the transfers, he nevertheless found based on the totality of evidence that the inference that he did so was irresistible. The learned judge discusses the reasons for that strong and irresistible inference in paras [722]–[736] of the grounds of judgment. The reasons could be summarised as follows:

(a) the entire RM42m ended up in the appellant's accounts and not into the accounts of PW42, Nik Faisal, Dennis See, PW37, PW49, the late Datuk Azlin or for that matter Jho Low;

(b) the appellant had utilised and spent the funds that went from the SRC to his personal bank accounts;

(c) the involvement in the transactions of the RM42m of those closely associated with the accused, namely, Nik Faisal and Datuk Azlin, even to the extent that he had delegated the supervision of his own personal accounts to them, is manifest;

(d) Nik Faisal, though removed as the CEO on 11 August 2014 following complaints by PW39, remained as a director on the Board of SRC and crucially also continued to be an authorised signatory for the bank accounts of the company, which could only have been done at the behest of the appellant;

(e) as the mandate holder for the appellant's personal accounts the connection between Nik Faisal's instructions and the appellant is especially compelling since the former had a trusting relationship with the appellant, if not why would the appellant keep Nik Faisal as his mandate holder as well as a signatory to SRC's bank accounts, even after his removal as the CEO of SRC for financial improprieties;

(f) all instructions given by Nik Faisal as the mandate holder for the appellant in respect of the transactions in his bank account are deemed in law to be the instructions of the appellant and he cannot absolve responsibility by feigning ignorance about what went on in his account, see: of *Yap Khay Cheong Sdn Bhd v Susan George a/p TM George* [2019] 1 MLJ 410; [2018] 5 CLJ 345 (CA);

(g) the appellant is accountable for the activities and transactions carried out in his personal accounts, even if they were performed by Nik Faisal, more so since he was the appellant's mandate holder for the appellant's three personal accounts;

(h) SRC and GMSB never lodged any complaint with AmIslamic Bank on any unauthorised transactions involving their accounts; and

(i) none of the key individuals involved in the transfers of the total sum of RM42m into and out of the account of IPSB, and into those of the appellant, namely Dennis See, PW37 and PW49 appeared to know the

reason for the transfer, much less the identity of the holder of Accounts 880 and 906, who was in fact the appellant. A

[239] In this regard, we find that the learned judge's inference from the abundance of evidence relating to circumstances in which the funds were moved out from the SRC account and finally into the appellant's account is well placed. The learned judge's analysis of the evidence, and his reasoning leading to his drawing of the inference is found in the paragraphs preceding para [736], where his concluding remarks on the issue is found. There is thorough judicial appreciation of the evidence by the learned trial judge. We are in full agreement with that finding as found in para [736] of the judgment that reads: B C

> [736] Evidence on the knowledge of the accused in the transfers, relevant to the fault element or the mental element of dishonesty (which will be discussed later), further supports the finding that the misappropriation was orchestrated by the accused who had been entrusted with dominion over the assets and properties of SRC, which indisputably included its funds of exactly some RM42m which had instead ended up in his own two personal accounts. The physical element of misappropriation of entrusted property by the accused in respect of the offence of CBT under the three CBT charges against the accused has thus been established. D E

[240] The learned trial judge had also referred to the appellant's affidavit (P616A) that was filed in his civil suit against Tun Ling Liong Sik (Civil Suit No 23NCVC-79–10 of 2015) where the appellant had confirmed his knowledge that the RM42m was transferred into his accounts from SRC. Further, the evidence of Ranjit Singh (PW55) showed aforesaid actual knowledge of the appellant through the admission in the pleadings filed on his behalf in the said civil suit. F

[241] The learned trial judge also alluded to the appellant's instruction letter (P277) to AmIslamic Bank in respect of his finding of knowledge on the part of the appellant of the transfers from SRC into his bank accounts. This letter was issued by the appellant himself, as Nik Faisal's mandate did not extend to the issuance of such instructions to transfer funds from the appellant's accounts in AmIslamic Bank. Based on this letter of instruction (P277) issued on 24 December 2014 on the utilisation of RM32m, which was to repay the appellant's loan from PBSB and PPC, and the involvement of Dato' Azlin Alias in the process to transfer the RM32m from IPSB to the appellant's accounts on 26 December 2014, the inference is clear that the appellant knew of the incoming funds from SRC. Otherwise, the appellant could not have issued the instruction letter to transfer such large amount of funds in his account. G H I

[242] The learned trial judge then went to make the following findings on the element of misappropriation and conversion:

A Observations on the use of the RM42m by the accused

[791] Three key observations may be made. First, all the 15 cheques were personally written by the accused himself. This was confirmed by some of the recipients themselves who saw the accused signing the cheques. The defence team for the accused too, in cross-examination did not suggest that he did not. In any event, the mandate granted to Nik Faisal did not extend to him issuing cheques or transferring funds out of any of the three personal accounts of the accused.

[792] Secondly, the 15 cheques involved the payments of a total sum of RM10,776,514. As I stated earlier, the statement of account for this Account 906 (P110) out of which the 14 cheques were issued, had indicated that the Account 906 was already overdrawn by RM2,333,084.03 on 9 February 2015, being the date prior to the transfer date, such that this deposit (from Account 880 which had originally received the SRC's RM10m from IPSB) of RM10m into Account 906 made possible the regularisation of this overdrawn position into a positive balance, which means that as has been shown, cheques already issued by the accused could be cleared (two of them) and more such cheques (the other 12) could be written by him.

[793] Thirdly, the records of the three personal accounts of the accused, which as has been shown in the respective statements of accounts, registered negative or relatively low balances immediately prior to the deposits of the RM42m from IPSB at the relevant dates into the pertinent accounts. However, considering the 15 cheques payments and the transfers by the accused pursuant to his instruction (P277) of RM32m to PBSB and PPC, the total spending out of the SRC's RM42m credited to his accounts was a total amount of RM42,776,514.

F Misappropriation and conversion have been proven

[794] As such, I find that the element of conversion of the SRC's RM42m over which the accused was entrusted with dominion, for the accused's own use, subject to the three CBT charges within the meaning ascribed to it under s 405 of the Penal Code, to be firmly established, in view of the extensive and overwhelming evidence of the utilisation of the same by the accused. In my judgment, based on the totality of evidence at the end of the prosecution stage, the ingredient of misappropriation, as is conversion for the accused's own use, has been established.

[243] Hence, we agree with the learned trial judge that the all important element of misappropriation of entrusted property by the appellant had been clearly established. The evidence clearly shows that the appellant not only misappropriated RM42m, the subject of the three CBT charges, but also converted to his own use that which he had dishonestly misappropriated. The RM42m, contrary to the appellant's assertion that he used it for corporate social responsibility (CSR) programs of the company, had in fact been used for his personal benefit and for his political purposes.

[244] As for the element of dishonesty the learned trial judge had given it the importance that it deserves and had analysed the evidence and the law and

concluded that it had been established by the prosecution. The learned judge explained that dishonesty can be established by direct evidence or by reliance on the statutory presumption found in s 409B of the PC. The following paragraphs in the grounds of judgment bear that out:

Fourth ingredient of CBT — Whether there is dishonest intention

[833] Given that the prosecution has proved the presence of the accused as an agent of SRC and that he had misappropriated and converted to his use the entrusted property over which he had dominion, being the SRC's RM42m, the one other key element that must be established against the accused for an offence of CBT under s 409 of the Penal Code is the mental or fault element of the accused, which, as I have mentioned earlier is 'dishonesty'.

Presumption of dishonesty

[834] However in Malaysia, once the criminal act of CBT, by way of any of the three modes as stated, has been proved, the accused is presumed to have been dishonest until the contrary is proved.

[835] Section 409B of the Penal Code reads as follows:

409B Presumption

(1) Where in any proceeding it is proved:

(a) for any offence prescribed in sections 403 and 404, that any person had misappropriated any property; or

(b) for any offence prescribed in sections 405, 406, 407, 408 and 409, that any person entrusted with property or with dominion over property had:

(i) misappropriated that property;

(ii) used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied which he had made touching the discharge of such trust; or

(iii) suffered any person to do any of the acts described in subparagraph (i) or (ii) above, it shall be presumed that he had acted dishonestly until the contrary is proved.

[836] The case of the prosecution as stated in its written submissions is that the accused had actual knowledge of the SRC monies being deposited into his personal bank accounts, such that the accused's dishonest intention has been established by direct evidence. At the same time, the prosecution also relies on this presumption of dishonesty in s 409B(1) of the Penal Code. In the case referred to earlier, which is the decision of the Court of Appeal in *Public Prosecutor v Cho Sing Koo & Anor* [2015] 4 MLJ 689; [2015] 4 CLJ 491 it was observed as follows:

[15] Therefore by operation of s 409B(1)(b)(ii) of the Penal Code the respondents were presumed to have acted dishonestly when they caused payments to be made to the unauthorised individuals. The presumption can of course be rebutted by the prosecution's own evidence but there is none in this case. It behoves the respondents

A therefore to adduce evidence to rebut the presumption on a preponderance of probability and this can only be done if they were to enter their defence.

[837] Similarly in the earlier High Court decision in *Hj Maamor Hj Abdul Manap v Public Prosecutor* [2002] 6 MLJ 668; [2003] 1 CLJ 370 it was already held that before the presumption contained in s 409B can be activated, the prosecution must
B first prove that the accused had misappropriated the sums of money involved.

[838] The presumption in this case has thus been activated given proof of the commission of the two forms of CBT within the scheme of s 405 of the Penal Code. In that, they had been perpetrated with dishonesty. And it is for the accused now to
C disprove dishonesty.

[839] Nevertheless, the prosecution has also during the prosecution's case sought to establish this element of dishonesty on the part of the accused, independently of the presumption.

Reliance on evidence to establish the element of dishonest intention
D

[840] In my evaluation of the evidence, I find that the prosecution has, notwithstanding the presumption, successfully proved dishonest intention on the part of the accused when he performed the two forms of CBT, such that he had dishonestly misappropriated and dishonestly converted to his own use the entrusted
E property being the RM42m which belonged to SRC.

[245] The learned judge's lengthy discussion on the evidence of dishonest intention is found from paras 856–936 of the grounds of judgment. The analysis of the evidence is rather comprehensive, with some degree of depth and
F intensity. We find no reason to contradict the findings made by the learned trial judge in this regard. The findings of dishonesty are well supported by evidence.

The CSR defence

G **[246]** The appellant contended before us that the usage of the funds that were transferred from SRC into his personal accounts were for purposes of CSR programs. The evidence however does not support this assertion, and the learned trial judge rejected this defence. The appellant was never an authorised person to carry out CSR programs for SRC, GMSB or IPSB, and the actual
H usage of the funds by the appellant belies this defence. The expenditures were for the personal benefit of the appellant, directly and indirectly, and in some cases for political purposes connected to and calculated to advance the appellant's political career. In any event, the reason or purpose of expenditure after dishonest misappropriation are not relevant to a CBT charge.

I

The Arab donation defence

[247] Despite the overwhelming evidence, the appellant denied knowledge of the movement of the SRC funds into his accounts. The appellant claimed that

he had assumed that the funds that came into his accounts were donations from the Saudi Royal family. In support of this, reference was made to some Arab letters (D601–D604) which were purportedly written by one Prince Saud Abdulaziz Al-Saud on behalf of the King of Saudi Arabia. However, neither the maker was called nor the authenticity of these letters established at trial. The contents of the letters were inadmissible hearsay. The letters were marked as exhibits merely for the purposes of establishing the fact that these letters were given to AmIslamic Bank when queried as to the source of the funds entering the appellants accounts. These letters were marked by agreement of the prosecution and defence to prove merely the production of the letters to AmIslamic Bank and nothing more.

[248] The learned trial judge considered this defence in some detail before rejecting it. He found that the appellant's belief that the funds in his accounts were Arab donations was unbelievable when weighed against the totality of the evidence. The knowledge of the appellant as to the source of the funds is clear from the evidence, where the appellant knew of the transactions and the status of his bank accounts. The evidence shows that Nik Faisal, Dato Azlin Alias and for that matter Jho Low were in active communication with the appellant in order to manage the funds in the appellant's bank accounts. These individuals who were charged with the responsibility to ensure sufficient funds in his bank accounts needed to communicate and inform the appellant of the account balances and the source of funds.

[249] The learned judge's evaluation and analysis of the 'Arab donation' defence and its rejection is found in paras 943–945 of the grounds of judgment:

> Whether The Arab Royalty Donation Version Tenable
>
> [943] At the same time, the one other key contention of the defence related to his denial of knowledge of the SRC's RM42m is that the funds that he had spent on came from Arab royalty donations.
>
> [944] In my view however, the contention that the accused had believed that the source of the funds in his accounts was the alleged donation from the Arab royalty is difficult to sustain because in addition to the evidence of knowledge of the transactions and of status of his accounts which I have set out, evidence of money trail in bank documents further shows that the said bulk of the donations was either returned (in 2013) and the remainder had been fully utilised several months before the deposit of the RM42m from SRC in the accounts of the accused beginning late December 2014.
>
> [945] Even though the defence pointed to another tranche of a series of an alleged Arab donation in 2014, its total amount was only RM49m whilst the utilisation by the accused was more than triple that amount during the pertinent period of the later part of 2014 and early 2015. The accused must have known he did not have that much funds in his accounts, such that his continued spending must have meant

A and raised the inference that he knew there were other sources of funds which included SRC (other than cash deposits) that had been pumped into his Accounts 880 and 906. It is irresistible that an inference of dishonest intention to cause wrongful gain to himself and wrongful loss to SRC end of December is to be drawn from this knowledge of the accused, and from the evidence as set out earlier.

B

[250] We too found this 'Arab donation' defence untenable for the same reasons as that found by the learned trial judge. Firstly, the evidence clearly shows that funds originated from SRC and ended in the personal accounts of the appellant. Now, if they were personal donations from the Saudi monarch to
C the appellant, then there is no reason for it to be deposited into SRC's account. SRC is a government linked company owned by MOF Inc. Secondly, the alleged bulk of the Arab donation entered and left the appellant's account sometime 2013, well before the RM42m came from SRC to the appellant's bank accounts. Thirdly, the alleged second tranche of a series of an alleged Arab
D donation in 2014 amounted in total to about RM49m only (including a RM5m which had nothing to do with the alleged Arab donation), which had been used up except for about RM6m, before the arrival of the RM42m into the appellant's bank account from SRC. Evidence had shown that from the
E later period of 2014 until early 2015, some RM136m was utilised by the appellant despite his belief that only RM49m came pursuant to the alleged fourth Arab letter (D604). Hence, we agree with the learned deputy's contention that the circumstances surrounding the fourth Arab letter clearly shows that it is a fabrication and that the appellant could not honestly belief
F that the RM49m is from the Saudi monarch. In fact the utilisation of funds by the appellant in his account during the pertinent period of the later part of 2014 and early 2015 was more than triple that amount. Hence, the defence contention that the appellant honestly believed the funds were part of the Saudi monarch's donation is not borne out by the hard evidence before the court. In
G short, the evidence does not support the appellant's contention or belief that the source of the RM42m was the 'Arab donation'. Therefore, the defence contention that the appellant had an honest belief that he was entitled to deal with the funds in question is unsustainable. In the overall, we find that there is ample evidence that the appellant was entrusted with dominion over the
H RM42m in his capacity as agent with a specific purpose relating to strategic investments but instead the funds were used by the appellant for his own purpose.

[251] The appellant proffered two other defences. The first was the appellant's
I contention that he had no knowledge that the funds that entered his accounts were indeed the property of SRC. The second was that he was deceived by Jho Low and others such as Nik Faisal. Once again the learned trial judge considered these defences in some detail and ultimately rejected them. This is borne out in paras 937–1942 of the grounds of judgment:

Defence of denial of knowledge

Whether the contention of the defence on absence of knowledge valid

[937] During the cross-examination of the witnesses for the prosecution, the defence did not really challenge that the monies were indeed deposited into the accused's personal accounts at AmIslamic Bank, or even dispute the evidence adduced by the prosecution that the accused had subsequently used the monies. The accused did not seek to proffer any account or reasons for the monies received into his account, other than the unsubstantiated suggestion that it was for CSR purposes. The one consistent challenge put to the prosecution witnesses however, particularly to PW54 (the AmBank relationship manager) and PW57 (the investigating officer) is that the accused did not have knowledge that the relevant monies in his account were, in fact, the property of SRC.

[938] One would ordinarily not spend on funds one does not have. In fact, one could not possibly do so. Here the defence argues that the accused did not know that the funds came from SRC and that his spending was assumed to have been made possible by the Arab royalty donations.

[939] The argument that the accused did not know the balances in his accounts as he did not manage his own accounts lacks substance because the persons whom the accused had tasked with that responsibility, namely Nik Faisal and Datuk Azlin must have had communicated with and apprised the accused of the balances and sources of funds to enable the accused continue issuing the many and various cheques that ran into hundreds of millions in RM. The person whom the accused did not identify as one who helped manage his accounts, namely Jho Low in fact has been shown in the BBM messages (P578) and confirmed in the testimony of PW54 to have had been in active contact with the accused on matters pertaining to the details of balances and management of his accounts.

[940] And in any event, I have earlier set out in some detail the overwhelming evidence which strongly militate against this stance of the accused on lack of knowledge. On the contrary, the evidence shows both that the accused had full knowledge, given his affidavit admission as well as that by the process of inference, he must have known that the RM42m from SRC were deposited into his personal accounts.

Whether Jho Low and others deceived the accused

[941] The other suggestion by the defence put to PW54 is that the accused had been misled by Jho Low and his associates, such as Nik Faisal who had conspired against the accused, and had illegally authorised the bank to execute transactions in and out of his personal accounts which were not known to, much less consented by the accused. Again however, the same evidence which establishes the accused had the requisite knowledge of the status of his accounts at the material time or from which knowledge and dishonest intention can be easily inferred, as discussed above, plainly negates this contention.

[942] Furthermore, it is quite far-fetched if not absolutely incredulous to even conjure a suspicion that a few individuals known, and close to the accused would have the audacity to defraud the sitting Prime Minister of the country. Furthermore,

there is no assertion as to the purpose of such an alleged scheme against the accused. There is no suggestion that these rogue individuals had benefited from their alleged manipulation of the personal accounts of the accused. On the contrary, the accused benefited from having to continually making payments out of his personal accounts, from movements of funds which originated from SRC, now subject to the seven charges before this court.

[252] The defence had during the prosecution case advanced the defence theory and case that Jho Low had manipulated his bank accounts and thereby caused RM42m to flow into his accounts with his concurrence and knowledge. Hence, it was the appellant's case that he had been framed by Jho Low and purportedly by the bankers to make it appear that he had indeed committed the CBT offences. However, this defence was later abandoned, thus casting aspersion on the credibility of the defence. This became manifest when the appellant readily admitted that it was he who had instructed Jho Low together with the late Dato Alin Alias and Nik Faisal to ensure that there would be adequate funds available in his accounts for him to draw on, which he did by issuing countless cheques running into millions of Ringgit. Hence, it is evident that Jho Low and his associates were the appellant's minions who were answering call and obeying his instructions. It would be too late in the day to feign ignorance and distance himself from the grand plan of using SRC's funds for his own purposes.

[253] The duty of the trial judge is to consider the defence case and test it against the entirety of the evidence to ascertain if the case for the defence raises any reasonable doubt. Here, the learned judge apprised the defence contentions and ultimately rejected them, and in doing so he has given his reasons. We do not find any misdirection, or non-direction that may amount to a misdirection in this regard. The learned trial judge had carried out his duties and responsibilities at the close of the defence case in accordance to the established principles of law. Having done that, the learned trial judge found, and quite correctly we must add, that the three CBT charges had been proved beyond reasonable doubt. Thus, we do not find any appealable errors on the part of the learned trial judge that would warrant appellate intervention.

The three money laundering charges

[254] The three s 4(1) AMLA charges are the same save for the dates and amount, where each of the three charges appears to refer to the RM27m, RM5m and RM10m specified in the three CBT charges, respectively, which in aggregate amount to RM42m.

[255] Section 4 of the AMLA provides:

4 Offence of money laundering

(1) Any person who:

(a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence;

(c) removes from of brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or

(d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an offence, commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.

(2) For the purposes of subsection (1), it may be inferred from any objective factual circumstances that:

(a) the person knows, has reason to believe or has reasonable suspicion that the property is the proceeds of an unlawful activity or instrumentalities of an offence; or

(b) the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is the proceeds of an unlawful activity or instrumentalities of an offence.

(3) For the purposes of any proceedings under this Act, where the proceeds of an unlawful activity are derived from one or more unlawful activities, such proceeds need not be proven to be from any specific unlawful activity.

(4) A person may be convicted of an offence under subsection (1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

[256] It must be noted that the common thread in s 4(1)(a), (b), (c) and (d) of the AMLA is the prerequisite that there must be proceeds of an unlawful activity in respect of any one of the conduct mentioned therein for it to amount to an offence of money laundering. The three money laundering charges in this case allege that the appellant had received proceeds of an unlawful activity in contravention of s 4(1)(b) of the AMLA.

[257] To establish an offence under s 4(1)(b), the prosecution need to prove three elements:

A (a) that the accused had received the said monies stipulated in the charge;

(b) that the monies received are the *proceeds of an unlawful activity*; and

(c) on the mental element of the crime, the presence of knowledge of the accused on the source of the proceeds, which under s 4(2), can be
B inferred from objective factual circumstances.

[258] The words 'proceeds of an unlawful activity' is defined under s 3 of the AMLA as follows:

C 'proceeds of an unlawful activity' means any property, or any economic advantage or economic gain from such property, within or outside Malaysia:

(a) which is wholly or partly:

(i) derived or obtained, directly or indirectly, by any person from any
D unlawful activity;

(ii) derived or obtained from a disposal or other dealings with the property referred to in subparagraph (i); or

(iii) acquired using the property derived or obtained by any person through any disposal or other dealings referred to in subparagraph (i) or (ii); or
E

(b) which, wholly or partly, due to any circumstances such as its nature, value, location or place of discovery, or to the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property referred to in subparagraph (a)(i), (ii) or (iii), can be reasonably believed to be property falling
F within the scope of subparagraph (a)(i), (ii) or (iii);

And the words 'unlawful activity' is itself also defined under s 3 of the AMLA as follows:

G 'unlawful activity' means:

(a) any activity which constitutes any serious offence or any foreign serious offence; or

(b) any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence or any
H foreign serious offence, regardless whether such activity, wholly or partly, takes place within or outside Malaysia;

And s 3 further defines 'serious offence' as follows:

I 'serious offence' means:

(a) any of the offences specified in the Second Schedule;

(b) an attempt to commit any of those offences; or

(c) the abetment of any of those offences.

[259] The offences listed in the Second Schedule are the predicate offences for the money laundering offence, and in that list are included offences under s 23 of the MACC Act and s 409 of the PC. Hence, the first four charges faced by the appellant herein, ie the one s 23 MACC Act charge, and the three s 409 of the PC charges come within the definition and are the predicate offences for the s 4(1) of the AMLA charge. In fact, s 4(1) of the AMLA itself is listed in the Second Schedule to the AMLA as a serious offence. As such, all the offences the appellant is charged with are 'serious offences' within the meaning of s 3 of the AMLA.

The first element — Receipt of RM42m

[260] The fact of the appellant receiving the total amount of RM42m into his personal accounts have been addressed earlier in the context of s 409 of the PC offences. The transfer of the RM27m and RM5m, the subject of the first and second AMLA charges took place on the same day pursuant to the same set of instructions. We do not intend to traverse the same facts once more. Suffice to say that the learned trial judge in his grounds of judgment at paras 967–974 has adequately covered the facts and evidence as regards these two transfers and receipt of funds by the appellant in his accounts.

[261] As for the facts, circumstances and evidence relating to the RM10m specified in the third money laundering charge, the learned trial judge has quite comprehensively laid them down in paras 975–980 of the grounds of judgment.

[262] Hence, there is ample evidence of the appellant having received the sums of monies stipulated in the three AMLA charges.

The second element — Proceeds from unlawful activities

[263] The second element of the s 4(1) charges is to prove that the sums of RM27m in the first charge, RM5m in the second charge and RM10m in the third are proceeds of unlawful activity. Now, once the predicate offence under s 409 is proved, then any proceeds which are the subject matter of the predicate offence becomes unlawful and hence the second element of the s 4(1) of the AMLA offence would be fulfilled.

[264] In *Aisyah bt Mohd Rose & Anor v Public Prosecutor* Tengku Maimun Tuan Mat JCA (now Chief Justice) held that:

> [51] For completeness, we acknowledge that pursuant to s 4(2) of AMLATFA, the conviction for an offence under s 4(1) can be sustained even without the conviction for a predicate offence. In this appeal, the predicate offence of criminal breach of trust under s 409 of the Penal Code has been proved.

A [52] On the totality of the evidence, we are unanimous in our view that the convictions of the first and the second appellants for the first charge are safe. It follows that the offence for the second charge under AMLATFA is also safe. We therefore dismiss the appeal against convictions and we affirm the convictions of the appellants.

B

[265] Similarly, in the present case, the offences under s 23 of the MACC Act and the three offences under s 409 of the PC, have been proved and as such; we are of the opinion that the predicate offences have been established for all three charges under s 4(1) of the AMLA. Thus, the element of unlawful proceeds has
C been proved for all three charges. There is elaborate and lengthy discussion by the learned trial judge as to whether there is necessity for the appellant to be convicted for a predicate offence before the second element is satisfied. We are guided by the decision of this court in *Aisyah bt Mohd Rose & Anor v Public Prosecutor* where it was quite categorically stated that 'pursuant to s 4(2) of the
D AMLATFA, the conviction for an offence under s 4(1) can be sustained even without the conviction for a predicate offence'. However, what is necessary to be proved by the prosecution to establish a prima facie case is that an unlawful activity as defined in s 3 of the AMLA had been committed from which the
E accused had obtained proceeds. Here, at the close of the prosecution case, the learned trial judge had ruled that a prima facie case had been established for the charge under s 23 of the MACC Act and the three s 409 of the PC charges. Hence, at that stage of the prosecution case, the unlawful activity or predicate offence, and the proceeds therefrom, which are necessary for the s 4(1) of the
F ALMA offence had been made out.

Whether proceeds are the same as the fund misappropriated under the CBT offences and the gratification under the abuse of position charge

G **[266]** The appellant raised the issue that the same monies ie RM27m, RM5m and RM10m in the three AMLA charges are the same as the CBT charges under the Penal Code, and are cumulatively the RM42m mentioned in the abuse of position charge under the MACC Act. Learned counsel argues that this seems to indicate that the AMLA offences are completed at the same time
H the CBT offences are completed, and contends that if that were so then the AMLA charges cannot stand as the proceeds are said to have been derived from the commission of the CBT offences.

[267] The learned trial judge had carefully considered the evidence and law in
I this regard and had concluded that the AMLA charges are indeed post-predicate offences as the proceeds are derived from the commission of the predicate offences. In this regard, as for the CBT charges, the offences are completed when the respective sums of RM27m, RM5m and RM10m were misappropriated out of the SRC's bank account. Hence, the receipt of the

proceeds by the appellant into his bank accounts were in actuality the receipt of proceeds of the unlawful activities committed by the appellant flowing from the completed CBT offences. Paragraphs 1009–1020 of the grounds of judgment deal with this.

[268] And as for the s 23 of the MACC Act offence, as discussed earlier, the receipt of gratification is not a requisite element of the offence. The offence is completed when the appellant had taken a decision or action in a matter in which he has an interest. The receipt of the gratification is not a requirement to prove completion of the offence. The actual receipt of the gratification, ie the sum of RM42m, is the receipt of proceeds of unlawful activities through the commission of the abuse of position/office offence under s 23 of the MACC Act, which then becomes the basis for an offence under s 4(1) of the AMLA Act.

[269] Hence, we agree with the findings of the learned trial judge that there is no duplicity in the charges by the mere fact of the RM42m, or its constituent sums of RM27m, RM5m and RM10m, being stipulated in the seven charges against the appellant. After all the offence of money laundering is a post predicate offence. In this regard, we agree with the findings of the learned trial judge in paras 1019–1025, where the learned judge held:

> [1018] Having examined the statutory provisions relevant to the seven criminal charges, in my judgment, the three money laundering charges can be sustained alongside the other charges and reconcilable with the proposition that money laundering is a post-predicate offence. I accept and firmly subscribe to the legal position that there can only be proceeds once the predicate offence is complete. The proceeds flow from the predicate offence, or more accurately, the unlawful activity.
>
> [1019] In my assessment, evidence nevertheless shows that in respect of the three CBT charges, the misappropriation occurred at the point when the funds of RM42m or any larger part thereof (originally the RM50m) was transferred out of SRC. At this point, such as when the RM42m was transferred into the bank account of GMSB, which was even before the accused received the funds in his accounts as specified in the money laundering charges, an offence of CBT as framed in the three CBT charges was already completed.
>
> [1020] This is because the property under the control and entrustment of the accused was dishonestly misappropriated with the wrongful loss occasioned to SRC. Accordingly, when the RM42m finally flowed into the accused's accounts the said funds could rightly be construed as proceeds of unlawful activity. Incidentally — and this is no less significant — the CBT charges mention only the misappropriation by the accused of the RM42m, not the receipt by the accused of the sum of RM42m.
>
> [1021] In respect of the charge under s 23(1) of the MACC Act, which concerns the prohibition against a public officer using his office for gratification, the offence is complete, having regard to the presumption under s 23(2) discussed earlier, upon

A the action taken by the officer on a matter in which he has an interest. Receipt of the gratification is strictly not an ingredient of the offence under s 23(1) of the MACC Act. As such, when the gratification is finally received, the offence has already earlier completed. This again means that the receipt may properly be said to be of proceeds of an unlawful activity.

B [1022] The other reason why I consider that the charges in this case can be sustained lies in the definition of 'unlawful activity', which I repeat reads as follows:

> 'unlawful activity' means:
>
> (a) any activity which constitutes any serious offence or any foreign serious offence; or
>
> C (b) *any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence or any foreign serious offence*, regardless whether such activity, wholly or partly, takes place within or outside Malaysia; (Emphasis added.)

D [1023] The definition of unlawful activity is therefore not confined only to the activity which constitutes a predicate offence (the serious offence as defined in the Act) such as the abuse of position offence or the CBT offence but also any activity which is of such nature, or occurs in such circumstances that it results in or leads to
E the commission of any serious offence.

[1024] What this therefore means is that an unlawful activity need not necessarily be only the predicate offence itself, but can separately be an activity which results in the predicate offence. It follows that even though in all cases of prosecution under s 4(1) of the AMLATFPUAA, the unlawful activity must be proven, it does not
F mean that in all cases, the predicate offence itself must be proved to have been committed. Depending on the charges and the evidence adduced at trial, it suffices also that an activity that leads to the commission of the offence be established.

[1025] As such, in the instant case, any objection (assuming it is valid) that the
G proceeds in the money laundering charges is the same property which completes the offences of CBT and of abuse of position (which is not, as just explained), may be overcome by a finding by this court that on evidence, the proceeds which was received by the accused in the money laundering charges is derived from an unlawful activity which is an activity which had resulted in the commission of the predicate offences.

H

[270] Therefore, we find that the receipt of the funds of RM27m, RM5m and RM5m (totaling the sum of RM42m) by the appellant into his personal bank accounts are proceeds of unlawful activities and thus the second element of the
I offence under s 4(1) of the AMLA has been established.

Third element — Knowledge that the proceeds are from unlawful activities

[271] When an accused person fails to take reasonable steps to ascertain whether monies he received were proceeds of an unlawful activity, and that he knows or ascertains the source of the funds, then the necessary culpable mens rea for a s 4(1) AMLA offence can be imputed to him. This was very well explained by Abang Iskandar JCA (now CJ of Sabah and Sarawak) in *Azmi bin Osman v Public Prosecutor and another appeal* [2016] 3 MLJ 98; [2015] 9 CLJ 845 in the following terms:

> [35] As was alluded to earlier, it is immaterial that he, or for that matter anyone, is not convicted for the predicate serious offence. It is money laundering, for example, if he engages in any manner involving proceeds of an unlawful activity if he, without reasonable excuse, fails to take steps to ascertain whether or not the property is the proceeds of an unlawful activity. The law recognises the difficulty that the investigation may face in absolutely establishing the direct nexus between the accused and the illegal proceeds from the unlawful activity. That was the reason as to why the definition of money laundering has been couched in the manner that appears under s 3 of the AMLATFA in which para (aa) imputes knowledge of the proceeds being from an unlawful activity viewed from an objective factual circumstance, and under para (bb) in respect of a natural person, his conduct, where he had without reasonable excuse failed to take steps to ascertain that the monies are not proceeds of an unlawful activity, namely a duty is cast on him to take steps to ascertain the nature of the proceeds, in terms of their lawfulness or legitimacy. With respect, we agree with the learned deputy on this issue on the true effect of paras (aa) and (bb) being the mens rea element in the definition of money laundering under s 3 of the AMLATFA.
>
> [36] Those paras (aa) and (bb) define the mens rea necessary to turn the preceding actus reus (conduct) into a money laundering offence. It does not excuse wilful blindness on the part of the accused person. There is no room for safe harbours, where proceeds of an unlawful activity may find itself quietly nestling in so-called bank accounts of 'innocent' account holders. A bank account holder must be vigilant and must take steps to ensure that monies that are received in his account are not proceeds of any unlawful activity and that he knows that the source of those monies is lawful, lest he runs afoul of AMLATFA and runs the risk of being charged for an offence of money laundering. The doctrine of wilful blindness imputes knowledge to an accused person who has his suspicion aroused to the point where he sees the need to inquire further, but he deliberately chooses not to make those inquiries. Professor Glanville Williams has succinctly described such a situation as follows: 'He suspected the fact; he realised its probability but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone is wilful blindness' (Glanville Williams, *Criminal Law 157* (2nd Ed) 1961). Indeed, in the context of anti-money laundering regime, feigning blindness, deliberate ignorance or wilful ignorance is no longer bliss. It is no longer a viable option. It manifests criminal intent.

[272] The learned trial judge then undertook a lengthy and detailed exposition of the application of facts of the case to the law in determining that the appellant had demonstrably shown that he had the necessary mens rea for the three offences under s 4(1) of the AMLA Act. This, the learned judge had concluded in paras 1030–1032 of the grounds of judgment, before setting out the details of the factual circumstances supporting that conclusion in paras 1033–1058:

> [1030] The culpability of an accused person under s 4(1) is premised on being knowingly concerned with the illegal proceeds from the unlawful activity. This knowledge, as formulated in s 4(2) is the mental or fault element of a money laundering offence. In other words this third element of the offence of money laundering will be satisfied if it is proved that the accused either knew, or had reason to believe or had reasonable suspicion that the monies which were transferred into his Account 880 and Account 906 as per the three charges were the proceeds of an unlawful activity, or that the accused without reasonable excuse failed to take reasonable steps to ascertain whether or not the monies were the proceeds of an unlawful activity.
>
> [1031] Section 4(2) speaks of the mental element being inferred from objective factual circumstances. Again, evidence from which knowledge and dishonest intention of the accused has been inferred in respect of the CBT charges has been analysed in section on the CBT charges. Much of the same evidence supports the inference to be made under s 4(2) for the three money laundering offences. At the risk of repetition, the key objective factual circumstances established during the prosecution case are several.
>
> [1032] I find that there is no shortage of factual objective set of circumstances that may be justifiably invoked in this case. For there are many and various.

[273] We are in full agreement with the learned trial judge's findings in this regard. The findings are well supported by the evidence. The culpability of the appellant is based on the fact that he was knowingly concerned with the illegal proceeds from unlawful activities. The evidence clearly shows that the appellant knew, or had reason to believe or had reasonable suspicion that the funds entering his personal bank accounts at AmIslamic Bank were proceeds of unlawful activities. In fact, the appellant had without any reasonable excuse failed to take steps to ascertain whether or not the funds were the proceeds of unlawful activities.

[274] The learned trial judge had referred to the appellant's affidavit (P-616-A) filed in the civil suit against Tun Ling Liong Sik where the appellant had admitted knowledge of the RM42m entering his bank account originating from SRC, though he denied knowledge of it having moved through the two intermediary companies GMSB and IPSB. Then there is the appellant's own letter to AmIslamic Bank (P277) instructing the bank to transfer funds totaling RM32m from his account to Permai Binaraya Sdn Bhd (PBSB) and to Putra

Perdana Construction (PPC) even before the funds entered his accounts at the time of writing and giving that instruction. This shows that the appellant knew well beforehand that SRC funds would be coming into his account. In addition to that, there is a plethora of evidence, which had been set out in the grounds of judgment from paras 1033–1058, that confirms the requisite knowledge on the part of the appellant for the purposes of the offences under s 4(1) of the AMLA. Having considered the evidence as a whole we find, just as the learned trial judge did, that there is ample evidence for the mental element being inferred from the objective factual circumstances as spelt out in s 4(2)(a) of the AMLA.

[275] The appellant would also be said to have the necessary mens rea for the AMLA offences based on s 4(2)(b) of the AMLA. This arises from the fact that the appellant did not make any enquires to ascertain whether the RM42m were proceeds of unlawful activities. This is what the law terms as wilful blindness. This is compounded by the appellant's subsequent conduct where even after PW37 and PW49 personally told the appellant in the middle of July 2015 as to the true nature of the transactions, the appellant continued to stay resolute in not wanting to make any enquiries or take actions to clarify or remedy any issues.

The Arab donation

[276] The Arab donation story once again reared its head in regards the mens rea of the appellant for the AMLA offence. This was once again dealt very clinically by the learned trial judge. This tale that surpassed even those from the Arabian Nights, not only lacked credibility, but was contradicted and dispelled by the documentary evidence. The learned trial judge as part of his judicial duty considered the defence in minute detail before dispatching it in the following terms:

> The Arab donation story
>
> [1064] In addition to the factual objective circumstances referred to above which give rise to the finding that the accused had also failed without reasonable excuse to take reasonable steps to ascertain whether or not the RM42m was the proceeds of an unlawful activity under s 4(2)(b), the other aspect of the objective factual circumstances concern more specifically to the alleged Arab donations or the personal donations from King Abdullah. The defence of the accused is that he had honestly believed that the SRC funds of RM42m which flowed into his personal accounts were part of the Arab donation monies.
>
> [1065] As has been discussed earlier in the section on CBT, evidence shows the accused returned a massive USD620m in 2013 to the outfit which made the transfer to his accounts but the accused accepted a further RM49m from alleged Arab sources barely a year later. Furthermore the bank statements have been shown to record that by October 2014 the alleged donations from the remittances in 2011

to 2013 had very substantially been used up. The RM49m that arrived later in 2014 could not have been the reason why the accused thought that the SRC's RM42m was part of the Arab donation monies of RM49m since during that period in late December 2014 and February 2015 the accused had spent almost RM136m. Thus even on this aspect, the mental element of the accused has been proved under both of s 4(2)(a) and s 4(2)(b) of the AMLATFPUAA.

[1066] The accused was then the serving Prime Minister. There was much public controversy on the matter. Yet he chose not to lodge any report with the bank or the authorities, when that would have been the very first and obvious thing reasonably expected by all and sundry to have been undertaken by any incumbent of not just an important public office, but the highest executive and elected position in the nation, as the Prime Minister and the Minister of Finance, who is publicly accused including in the international media, of committing financial crimes. The doctrine of wilful blindness, as explained in *Azmi bin Osman v Public Prosecutor and another appeal*, readily applies in the instant case, imputing knowledge on the accused who so manifestly had his suspicion aroused to the point that despite the glaring need to inquire further, he deliberately chose not to make those inquiries.

[1067] And it is also part of the doctrine of wilful blindness that the accused decided against obtaining the final confirmation because he wished in the event to be able to deny knowledge. It does therefore appear to me compelling an inference that that accused had deliberately chosen not to do anything regarding the matter as he knew that this would expose his involvement in a criminal activity. This more than amply proves the mental element of the accused in the three money laundering charges.

[1068] Accordingly, in respect of the element of knowledge, given the evidence stated earlier I find that the accused knew that the RM42m was proceeds of an unlawful activity under s 4(2)(a) or in the best case for the defence, the accused was wilfully blind in that he had failed without reasonable excuse to take reasonable steps to ascertain whether or not the RM42m was the proceeds of an unlawful activity under s 4(2)(b).

[277] We agree with the learned trial judge that the Arab donation story is nothing but a concoction that is completely bereft of any credibility. There is no evidence at all that the RM42m came from, or could have come from the Saudi monarch, nor is there any reasonable basis for the appellant to have formed that belief. The funds came from SRC, and that is well established.

[278] In the premise we find that all elements of the three offences under s 4(1) of the AMLA had been well established by the prosecution.

The trial judge's consideration of the defence case

[279] Section 182A of the CPC sets out the duty of trial court at the end of the defence case. The court must consider all the evidence adduced before the court to decide whether the prosecution has proved its case beyond reasonable doubt. In this regard, in *Prasit Punyang v Public Prosecutor* [2014] 4 MLJ

282; [2014] 7 CLJ 392, Azahar Mohamed JCA (now Chief Judge of Malaya) held that:

> In accordance with the provisions of s 182A(1) of the Criminal Procedure Code, it is the bounden duty of the learned JC, at the conclusion of the trial, to consider all the evidence adduced before him and shall decide whether the prosecution has proved its case beyond reasonable doubt. The legislature has advisedly used the term all the evidence. The emphasis must be on the word all.

Hence, if the defence case raises any reasonable doubt in the prosecution case, then the appellant would be entitled to an acquittal. Therefore, the burden upon the defence is to raise reasonable doubt. And if any statutory presumption had arisen, it is then incumbent upon the appellant to rebut that presumption on a balance of probabilities. See: *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89; [1968] 1 LNS 116.

[280] The trial court in its assessment and evaluation of the evidence to ascertain if the charges had been proved is to follow the principles of deductive reasoning laid down by Suffian J in the locus classicus *Mat v Public Prosecutor* [1963] 1 MLJ 263, which the Federal Court in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 endorsed as being the correct approach to adopt when evaluating the evidence at the close of defence case.

[281] And the Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 explained in clear terms what the respective duties and responsibilities of the prosecution and defence were at the end of the defence case. The court is required to ascertain if the prosecution had proved its case beyond reasonable doubt on every fact necessary to constitute a crime as stipulated in the charge. Now, as to what amounts to reasonable doubt was well set out by Mohd Zawawi Salleh FCJ in the recent case of *Muhammad Lukman bin Mohamad v Public Prosecutor* [2021] 4 MLJ 494; [2021] 7 CLJ 524:

> ... well-entrenched in jurisprudence is the principle that the burden is on the prosecution to prove beyond reasonable doubt of every essential fact necessary to constitute the crime with which he or she is charged (see *Nagappan Kuppusamy v Public Prosecutor* [1988] 2 MLJ 53; [1988] 1 CLJ 283; [1988] 1 CLJ Rep 229). This principle is a cornerstone in our criminal law. The prosecution must rely on the strength of its own evidence and not relying on the weakness of the defence (see *Mohamad Radhi Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 2073; [1991] 1 CLJ Rep 311; *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649). The concept of reasonable doubt though not defined in the Evidence Act 1950, has been interpreted through various judicial decisions. In *Commonwealth v Webstar*, 59 Mass 295, 320 (1850), the court opined that reasonable doubt is not meant to be comprehended as a mere possible doubt (as all that is connected to the affairs of humans can be said to contain a possible element of doubt). Reasonable doubt is the state of mind of the jurors wherein they are not

in a position to confirm the veracity of the guilt of the accused even after careful perusal of all the adduced evidence. In *Lt Kol Yusuf Abdul Rahman v Kol Anuar Md Amin, Yang Dipertua Mahkamah Tentera Pulau Pinang & Anor* [1997] 1 MLJ 562; [1997] 2 CLJ 752 (CA), Mahadev Shankar JCA said (at p 573 (MLJ); p 767 (CLJ)):

> In view of this definition the best explanation of 'reasonable doubt' is perhaps that given by Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372 where he said (at p 373):
>
> > (The degree of cogency)? need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that what will suffice' (see also *Tang Kin Seng v Public Prosecutor* [1997] 1 SLR 46 (HC)).

[282] The appellant opened his case as the first witness for the defence and chose to give sworn testimony. And thereafter, he called a further 18 witnesses to testify in his behalf. All the issues raised by the defence were given careful consideration by the learned trial judge. The summary of the defence raised in respect of all the charges is found from paras 1248–1258 of the grounds of judgment, and we quote:

> In respect of the abuse of position charge under s 23(1) of the MACC Act
>
> [1248] The defence submitted that the decision approving the setting up of SRC was made by EPU without compulsion. The motivation and the impetus for the approval was towards ensuring continuous security of the supply of energy to meet the requirements of the nation. This was an important national area of development as identified in the 10th Malaysia Plan and the National Energy Policy. Thus, the accused endorsed the said decision in furtherance of national interests.
>
> [1249] All throughout the events relating to SRC's application for financing from KWAP and KWAP's consideration thereof and the processes in government, particularly in the Ministry of Finance leading up to the Cabinet's approval to provide the two government guarantees to guarantee the financing of the total amount of RM4 billion by KWAP to SRC, the accused had acted in pursuance of the national interests intended to be met through SRC's proposed activities. All due processes were complied with and at each stage at KWAP and at the MOF and subsequently at both Ministerial and Cabinet levels, decisions were made by all parties based on considerations to further the intended national interests.
>
> [1250] Further, the accused participated in the Cabinet meetings in accordance with the usual processes in government and his actions were not to pursue any private interests. There was no cause to withdraw himself from the said meetings as there was no other interest held by the accused save that in pursuance of the government's initiatives. The same national initiatives were affirmed by the Cabinet unanimously in approving the provision of the said government guarantees.

[1251] In respect of the operations of SRC, the accused had not interfered with the Board of Directors' oversight over SRC's investments and affairs. At all times, the accused subscribed to the belief that the Board of Directors of the company were managing the affairs of SRC in the best interests of the company. In 2012, the accused approved of SRC to be brought under MOF Inc (MKD) directly in order to provide further oversight over SRC by the division overseeing MOF Inc's owned entities (BMKD) as was the recommendations of PW44 and the Cabinet's own decision in granting the second government guarantee on 8 February 2012.

[1252] The accused did not act corruptly or with any intention to obtain gratification from funds of SRC. Such action would be absurd given that SRC was an MOF Inc company and such transactions would be easily discoverable.

In respect of the CBT and money laundering charges

[1253] The defence submitted that the accused had never instructed any director of SRC including Nik Faisal on transactions relating to funds of SRC being transferred out of SRC and into his accounts in 2014 and 2015 including the RM42m transactions specified in the charges.

[1254] At all times the accused believed that the funds in his personal accounts in 2014 onwards were from further donations being made to him by the Arab royalty as had been the case since 2011 and originated from personal assurances by the late King Abdullah himself. This belief was fortified inter alia by the intimation from Jho Low who was held out and had reasonably been perceived as being an associate of the Arab royalty. The donations were further evidenced by supporting letters (D601–D604) which the accused understood were fully reported to AmBank, the Central Bank (BNM) and its Governor.

[1255] Since the prevailing circumstances in 2014 in relation to the intimation of further donations being made appeared to be the same as had been the case in relation to substantial donations received by the accused for the preceding three years since 2011, the accused therefore continued to utilise the funds in consonance with past practice.

[1256] The exact transactions in the accounts were in any event not known to the accused because he was only generally told about the sufficiency of funds on an ad hoc basis by his late principal private secretary, Datuk Azlin Alias. Nothing arose at the material time which would have led to reasonable suspicion that the circumstances were different from past years. This included the fact that cheques issued by the accused continued to be honoured.

[1257] The use by the accused of funds in the accounts since 2011 were not towards personal enrichment or wealth but were for CSR initiatives, being political, social, community and charitable causes as well as for the General Elections in 2013. After all, the utilisation of the funds for the elections was in line with King Abdullah's wish for the accused to continue leading the Government and Malaysia's stability being preserved.

[1258] As such, the accused had no knowledge of the RM42m transactions that flowed into his account or knowledge that the same were from the account of SRC.

A We shall deal with them now in relation to the issues raised in this appeal.

Defence in respect of the charge under s 23(1) of the MACC Act

B **[283]** The thrust of the appellant's defence to the charge under s 23(1) of the MACC Act revolves around the proposition that actions and decision that the appellant took at the two Cabinet meetings were in the national interest. The appellant had advanced this argument during the prosecution case, and now sought to expand it with his testimony and the testimony of the defence witnesses, particularly the evidence of DW3, the former Treasury Secretary C General and DW14, the former attorney general.

[284] The appellant submitted that his case is consistent with that which the former attorney general (DW14) had made in a press statement released at a D press conference on 26 January 2016, where DW14 had stated that investigations do not show that there was any conflict of interest on the part of the appellant in relation to the SRC loans from KWAP and the two government guarantees that were approved by the Cabinet. DW14 had concluded at that press conference that there was no evidence to show that the E appellant had abused his position during the two Cabinet meetings where the two government guarantees were approved.

[285] After considering the evidence of DW14 and also DW17, who was the former Chief Commissioner of the MACC, the learned trial judge concluded F that their evidence does not advance the appellant's case in rebutting the presumption or casting a reasonable doubt on the prosecution case. This was due to the fact that both DW14 and DW17 admitted in cross-examination that they were not aware of further investigations on the matter by the MACC after the press conference on 26 January 2016. Both DW14 and DW17 further G confirmed that they were unaware of the appellant's admission in his affidavit filed in the defamation suit against Tun Ling Liong Sik, which was alluded to earlier in this judgment. Thus, the learned trial judge held that the earlier findings and determination of both DW14 and DW17 could not be conclusive H as additional evidence gathered since then had thrown fresh light on the matter. Thus, the opinion of DW14 and DW17 would not have any bearing on the court's determination of the s 23(1) of the MACC Act charge. As the learned trial judge put it:

I > [1266] In other words, even though PW14 and PW17 decided that the investigations had by then been completed based on what had been gathered by MACC as recorded in the IP, for the purpose of this instant or any trial, any pronouncement of this court must be based on evidence produced to the court trying the case. It cannot, for example, be based on the findings of even the attorney general who as the Public Prosecutor moved to file the criminal charges in the first

place. To put it simply, the opinion of DW14 and DW17 cannot replace the evidence before this court to arrive at its decision.

...

[1268] Furthermore, it bears emphasis that in any event as the matter has now been translated into a formal criminal charge under s 23 of the MACC Act, it is for the court to determine whether or not an offence as framed in the charge has been proved beyond reasonable doubt based on all the evidence made available in this trial.

[286] We would agree entirely with that observation of the learned trial judge. Once the charge has been framed, then it is entirely within the court's purview to determine if the charge had been proved by the prosecution beyond reasonable based on cogent and admissible evidence. The court's determination of the charge cannot be in any way influenced or determined by the opinion of the former attorney general or for that matter the former Chief Commissioner of the MACC.

[287] The appellant further contended that the establishment of SRC was for national interest, in that there was a need for energy diversification and to move away from the nation's reliance on oil and gas. In this regard the appellant contends the EPU had evaluated SRC's plans and the need for its incorporation and given the green light. The appellant states that his own view on the matter coincided with that of the EPU. In respect of this the appellant relied on the evidence of DW3, the former Treasury Secretary General. The appellant's defence essentially was that what was done vis a vis SRC was in the national interest and was in tandem with the 10th Malaysia Plan and the National Energy Policy and that there was nothing sinister in the formation of SRC, and that the appellant's actions were motivated by public interest consideration commensurate with his role as the Prime Minister and Finance Minister.

[288] Even though the EPU had supported the formation of SRC and its intended role in the energy sector to shore up the nation's energy resources and diversify energy sources, EPU did not seem it fit to recommend the RM3 billion grant that was sought from the government to set up and operationalise the company.

[289] The learned trial judge then evaluated all the strands of evidence, both direct and circumstantial, and found that it does not support the appellant's contention that what he did was in the national interest. The appellant's fingerprint can be seen from the time of SRC's formation, the SRC loan application to KWAP, the appellant's intervention in the loan application, the appellant's influence in the approval of the government guarantees, the rushed disbursement of the loan of RM4 billion, the immediate transfer of the funds out of jurisdiction, the non-existent investments, and the brazenness in which

attempts to find out and recoup the funds were dismissed by the appellant. The appellant has since shown a total lack of interest in the usage of the RM4 billion. If indeed SRC was established for national interest purposes and the loans were granted to make strategic investments in the energy sector, then why the bullet drawdown of the loans when no such investments had been identified, and there was no need to make the drawdown and incur interest payments. It must be noted that the instructions for the bullet drawdown came from the appellant himself.

[290] The evidence as a whole negate the appellant's contention that he was motivated by national interest and not personal gain when he participated in the Cabinet meetings that approved the two government guarantees. The learned trial judge evaluated the appellant's defence in this regard and the analysis of that is found in paras 1479–1507 of the grounds of judgment. There is minute analysis by the learned trial judge of all of the appellant's contention in regard to the defence raised to the s 23(1) of the MACC Act charge. There is full and complete consideration of the defence by the learned trial judge before he dismissed them in paras 1500–1501 of the grounds of judgment:

> [1500] The defence of the accused does not add anything new of substantive worth and is not able to change the finding at the end of the prosecution case that the actions by the accused was not for the advancement of national interest and that evidence does not warrant the invocation of s. 23(4) of the MACC Act.
>
> [1501] Given the above, under no circumstances could the actions taken and decisions made by the accused at the two Cabinet meetings be said to be for the interest or advantage of the government.

[291] We do not find error on the part of the learned trial judge in his rejection of the appellant's defence in respect of the s 23(1) of the MACC Act charge. There is full judicial appreciation of the evidence and proper application of the law to the facts, as the substantially lengthy and erudite judgment bears out. In that regard, having scrutinised the learned trial judge's analysis and reasoning, we do not find misdirection on the part of judge. Thus, we affirm the trial judge's conclusion that the appellant had failed to rebut the presumption under s 23(2) of the MACC Act on a balance of probabilities and had failed to raise a reasonable doubt in the prosecution's case in respect of the s 23(1) of the MACC Act charge. Thus, we find that the charge against the appellant for using his position for gratification has been proved beyond reasonable doubt. We find that the conviction is safe.

Defence in respect of the charges under s 409 of the PC

[292] The learned trial judge considered at length the appellant's defence in regards to the s 409 of the PC charges. For a start, the appellant denied any involvement in the transactions relating to the transfer of funds from SRC's

account into his personal accounts, including the RM27m, RM5m and RM10m, which are the subject of the three CBT charges. The appellant further denied having ever instructed any director of SRC, including Nik Faisal, to make any transfers out of SRC's account to his personal accounts. The appellant also denied knowledge of the transactions of funds from SRC to GMSB, IPSB or PPSB or its group of companies.

[293] The appellant denied knowledge of the transfer of RM27m from PPSB on 8 July 2014 and RM5m from PPC on 10 September 2020 into his accounts. The appellant further denied having had any dealing with PPSB nor that he had borrowed or taken an advance from PPSB or its group of companies.

[294] The evidence, however, clearly shows that the RM27m and RM5m were transferred into the appellant's accounts and utilised by the appellant. These exact sums were transferred out from his accounts to PBSB and PPC in two separate transactions on 29 December 2014 via the appellant's own instruction letter to AmIslamic Bank (P277). This was in repayment of an advance given earlier, which is recorded in the PPB Group of Companies audited financial statement. The appellant cannot distance himself from this documented evidence (D661), which directly contradicts his oral testimony and the defence narrative.

[295] The fact remains, and the evidence shows that the RM27m, RM5m and RM10m that were transferred into his account from SRC were utilised by the appellant. The appellant never took any steps to return those funds, if indeed they were transferred without his authorisation or knowledge. The appellant did not adduce any evidence to show that the funds were utilised for any lawful purpose connected to SRC, or for that matter, that the utilisation of the funds were in the national interest, which according to the appellant was the purpose for which SRC was incorporated and funded by the government.

[296] Hence, we find that the learned trial judge had correctly ruled that the evidence adduced, including the appellant's instruction letter (P277) and the financial statement of the PPB Group (D661) clearly disproves the appellant's claim that he had no dealings with PBSB and PPC, and negates his claim that he had no knowledge of the RM42m transferred into his accounts.

[297] The appellant also testified that he had approved the appointment of IPSB for CSR work. However, there is no evidence documenting such appointment. In any event, why should SRC's funds flow through the appellant's personal accounts for IPSB to carry out CSR programs. In any event, as correctly observed by the learned trial judge, whether the appellant approved the appointment of IPSB by SRC to undertake CSR work is immaterial as it is irrelevant to the charges against the appellant. In fact, the

A utilisation of the funds in some instances were purely personal as in the case of the payment to contractors for renovations to his private house. This can hardly be said to be CSR work.

B **[298]** The learned trial judge further noted in the grounds of judgment:

> [1583] The defence submitted that the evidence established that vis a vis the 'cause' and 'purpose' of the RM42m being transacted out of SRC and into the accounts of the accused in December 2014 and February 2015:
>
> C (a) the RM42m has not been proved to be funds belonging to SRC. The RM4 billion from the KWAP financing was completely disbursed out and no evidence is led on the subsequent transactions. The evidence reveals that the RM42m was credited into SRC's account from unknown sources prior to the debit transactions on 24 December 2014, 5 February 2015 and 6 February 2015;
>
> D (b) the actual or probable cause of the RM42m transactions is indeterminate and the evidence supports the drawing of multiple inferences on the same;
>
> (c) the alleged involvement of Nik Faisal and PW42 in the transactions is also inconclusive given PW42's testimony which is consistent with evidence as
> E led in the defence case that the transactions were carried out outside the mandated mode of operations through emailed soft copy instruction letters by third parties and the signatures thereon were probably forged;
>
> (d) the evidence is capable of establishing that the same modus operandi which led to over RM290m funds in SRC's account being disbursed out
> F were transactions carried out at Jho Low's behest and for his own interests, benefit and agenda. This includes the RM42m transactions;
>
> (e) a clear favourable inference which is reasonably drawn from the evidence is that the accused did not cause the RM42m to be transacted out of SRC and into his accounts and that he was not involved in the said transactions
> G and the events which took place were outside his knowledge; and
>
> (f) there is sufficient evidence to establish that the RM42m transactions were related to the commission of CBT jointly by Nik Faisal, Jho Low and other persons pursuant to an offence under s 409 read with s 34 of the Penal Code without any involvement of the accused. This was also the
> H conclusions reached by the MACC in June 2018 from its investigations.

[299] The evidence overwhelmingly shows the flow of the funds from SRC, through GMSB and IPSB. The fact of the RM42m originating from SRC cannot be refuted. We agree with the learned trial judge that for the purposes of
I the s 409 of the PC charges, the prosecution need not show the source of the SRC funds, nor is it necessary to show that the RM42m was a part of the RM4 billion KWAP loan. It is sufficient for the prosecution to show that the RM42m funds were the property of SRC, which the prosecution had shown by a large body of evidence that the learned judge has painstaking laid out and

analysed in his judgment. In fact the very flow chart held by the former attorney general at his press conference shows that the funds are from SRC.

[300] The appellant called Krystie Yap (DW2) to advance his contention that the RM42m transferred out of SRC's account was without proper mandate as AmIslamic Bank had acted on scanned copies of instruction letters from SRC without any instruction and indemnity letter from SRC or GMSB. This issue has been covered earlier. The testimony of SRC's Chairman of the Board of Directors, Tan Sri Ismee Hj Ismail (PW39) and exh D519 show that AmIslamic Bank was authorised to act on electronic copies of instructions. In fact, DW2 had acted on electronic copies of instructions thus showing that AmIslamic Bank had the mandate to act on scanned instruction letters. In any event, SRC nor GMSB disputed the transfers or questioned the validity of the transaction, which the appellant was contend to receive and utilise, but now disputes. Even without the indemnity letter from SRC, as noted by the learned trial judge, the transfers of RM27m, RM5m and RM10m from SRC's account and the transfers from GMSB's account were duly effected and recorded in the relevant bank statements of SRC and GMSB without any complaint or allegation of wrongful debit of the accounts. Hence, we concur with the learned trial judge's ruling that the allegation by the appellant that the transfers from SRC and GMSB were improper and unauthorised by virtue of the bank acting on the scanned instructions letters is devoid of any merit.

[301] The appellant called Dato' Rosman Abdullah (DW8) to support his defence that he did not have any involvement in the RM42m that was transferred out from SRC. DW8, the owner and Chairman of the PPB Group was a childhood friend of the late Dato Azlin Alias. The appellant tried through the evidence of DW8 to distance himself from the RM42m by attempting to show that Jho Low was the one who instructed the transfer of the RM42m for Jho Low's benefit. DW8 further testified that the late Dato' Azlin Alias never informed him of his involvement in the transactions relating to the SRC funds.

[302] The involvement of Dato' Azlin in the management of the appellant's account is not disputed. The appellant himself testified that Dato' Azlin is the person from whom the appellant would inquire about the balances in his accounts. The evidence of PW37 and PW49 confirmed the involvement of Dato' Azlin in the RM42m transaction from IPSB to AmIslamic Bank.

[303] The learned judge had given full consideration to the evidence of DW8 and noted that, apart from the RM32m transferred from PBSB and PPC to the appellant's account in July/September 2014, DW8 had no dealings with the appellant's accounts. The fact that Dato Azlin is his childhood friend does not mean that Dato Azlin would tell DW8 about Dato Azlin's involvement in the appellant's account. Dato Azlin's non-divulging of that information to DW8

A does not mean that Dato Azlin was not involved in the transfer of the RM42m from SRC. In this regard, we concur with the learned trial judge that the evidence of DW8 does not create any reasonable doubt on the involvement of Dato Azlin in the RM42m transactions.

B **[304]** DW8 was in the course of cross-examination referred to the PPB Group audited financial statement (D661) and DW8 confirmed that the monies transferred to PBSB and PPC by the appellant in December 2014 were indeed repayment of the earlier advances and not reversal of accounting entries as contended by the appellant. The appellant had completed the repayment of the C funds advanced to him by PBSB and PPC in July and September 2014 through his own instruction letter dated earlier to the transfer on 24 December 2014 from his account. This was recorded in the PPB Group financial statement. This evidence of DW8 fortified the case for the prosecution in that it shows the D knowledge of the appellant that he was advanced these funds and subsequently repaid them using the funds from SRC that flowed into his accounts. Thus, the evidence of DW8 in fact supported the prosecution's case. Based on this, the learned trial judge correctly ruled that the evidence adduced clearly showed that part of the purpose for the RM42m was to repay the advance of RM32m E given to the appellant by PBSB and PPC in July and September 2014.

[305] Further, from the evidence of DW8, the learned judge quite correctly concluded that Jho Low was transferring funds for the benefit of the appellant, and that this strengthens the prosecution's narrative.

F

[306] The appellant also sought to rely on the evidence of the former attorney general Tan Sri Apandi Ali (DW14), and Tan Sri Dzulkifli Ahmad (DW17) the former MACC Chief Commissioner to support his contention that he did not G have knowledge as to where the RM42m came from. The appellant further sought to rely on the several press statements made by the MACC and DW14 to show that the appellant had been exonerated of any criminal wrongdoing, and that the current prosecution of the appellant is unfounded. This was similar to the contention raised by the appellant as regards the s 23(1) of the H MACC Act charge. However, as explained by DW14, his press statement (D780) was based only on findings disclosed as at 26 January 2016, and the evidence shows that further investigations had been carried out since then before the appellant was charged for these offences.

I **[307]** The defence also called Kamaruddin M Ripin (DW18), an officer from MACC to testify in respect of two MACC press releases dated 3 August 2015 (D805) and 5 August 2015 (D806). The first press release (D805) had stated that their investigations showed that the funds in the amount of RM2.6 billion which was deposited into the appellant's account was a donation and that it was

not from the funds of 1MDB. However, the press release added that the investigations relating to SRC which involved funds of RM4 billion was still ongoing.

[308] The second press release (D806) had stated that it had identified the donor of the RM2.6 billion and that he originated from the Middle East. It was also stated that the RM2.6 billion donation had no connection to 1MDB. However, with regard to SRC, the MACC reiterated that investigations were still ongoing and that it was being handled by its internal task force.

[309] Hence, when DW14 made his press statement, and DW17 referred to the two MACC press releases, in opining that the appellant was not involved in any criminal activity vis a vis SRC and its funds, investigations by MACC were still in progress. Further and additional statements were recorded from new and previous potential witnesses. Thus, there was no finality in the investigations for the appellant to contend that he had already been exonerated by the then attorney general as well as the MACC of any criminal wrongdoing. That contention cannot be a defence to the CBT charges. The court would have to construe and determine whether the charges had been proved beyond any reasonable doubt based on the evidence adduced and not on the opinion of the former attorney general or the former MACC Chief Commissioner.

[310] In this regard, it is worth noting that even after the two press releases, MACC did continue to investigate the purported source of funds from Saudi Arabia and to ascertain if the RM2.6 billion that came into the appellant's account was a donation. MACC officers went to Saudi Arabia to investigate the matter but failed to get any confirmation from the purported Arab donor in the form of admissible evidence.

[311] The press statements of DW14 cannot be held to exonerate the appellant of any criminal wrongdoing, nor can it be evidence of wrongful prosecution. The opinion of the DW14 which he stated during the press conference was in respect of the state of affairs as at 26 January 2016, whilst the investigations were ongoing. Surely, that premature statement of DW14 cannot bind a future attorney general from exercising his prosecutorial powers when additional evidence is collected.

[312] The appellant also raised the issue of whether the SRC and GMSB transactions on the RM42m were known to the respective Board of Directors. In this respect, based on the evidence of Krystle Yap (DW2) the appellant argues that the earlier evidence of Dato Suboh Md Yassin (PW42) needs to be re-evaluated. The appellant contends that the evidence of DW2 shows that PW42 was never involved in any of the banking transactions of SRC and GMSB. Further, the appellant submits that PW42's evidence that he did not

A sign any instruction letters to transfer funds from SRC to GMSB and to IPSB supports his contention that third parties had forged PW42's signature, and even possibly Nik Faisal's signature.

B **[313]** The appellant has consistently denied any knowledge or involvement in the RM42m transactions. The appellant's case theory is that these transactions were masterminded by Jho Low for his own benefit. As such, the appellant contends that PW42's change in position as regards his signature on the instruction letters and as regards his knowledge of the transactions, coupled with the removal of Nik Faisal as the CEO of SRC supports his contention.
C

[314] This very argument was raised by the appellant at the close of the prosecution case, and was rejected by the learned trial judge. Now, the difference is that there is the added evidence of DW2 and that of the appellant to be considered, which together with the entirety of the prosecution and
D defence evidence needs to be re-evaluated. This was done by the learned trial judge.

[315] We agree with submissions of the learned deputy that the evidence of
E DW2 and the appellant does not create any doubt in the prosecution case as regards the authorisation and validity of the transfer of the RM42m from SRC. The learned trial judge in rejecting this contention of the defence had stated that from the totality of the evidence, it is quite evident that the knowledge of PW39 and PW42 on the RM42m is rather limited, as it was Nik Faisal who
F was conducting the day-to-day running of SRC, at the behest of the appellant.

[316] PW42 had explained that he merely followed the request of Nik Faisal to sign any documents or letters without enquiring the legitimacy of the documents. The learned trial judge also took into account Nik Faisal's role as
G the key person through whom the appellant exercised his control over SRC. This special position of Nik Faisal is evident from the fact that he remained as the mandate holder of the appellant's bank accounts, a position of trust and confidence, despite his removal as CEO of SRC in August 2014 for financial improprieties. Though the appellant had removed Nik Faisal as CEO of SRC,
H he nevertheless continued as the authorised signatory to SRC's bank accounts.

[317] These strange acts of the appellant beg the question: Why would a discredited CEO of SRC, and that too for financial improprieties, be retained by the appellant as the bank signatory for SRC and also the appellant's personal
I account mandate holder. The only plausible answer seems to be that the appellant wanted Nik Faisal to remain in these important positions so as to facilitate transfer of funds out of SRC at his whims and fancies. Had Nik Faisal not continued as the authorised signatory of the SRC bank accounts, the transfers of the RM42m could not have been done, for it to ultimately find its

way into the appellant's bank accounts, where Nik Faisal is the mandate holder. This was an arrangement of convenience for the personal benefit of the appellant.

[318] The appellant further regurgitated the argument about the use of the cut and paste signatures of PW42 and Nik Faisal in the instruction letters concerning the RM42m transactions. This issue was comprehensively dealt with by the learned trial at the close of the prosecution in considering the prima facie case. We find that there is no fresh evidence adduced by the defence that would warrant a re-evaluation of the learned trial judge's earlier decision in this regard. The learned trial judge had quite correctly concluded that PW42 did not say that he did not sign the transfer instruction but that PW42 could not remember what he signed, and that this was compounded by the fact that PW42 had suffered a stroke which had affected his memory. PW42 further testified that he would merely comply with the request of Nik Faisal to sign documents presented to him.

[319] In our view, the learned trial judge had correctly observed that despite what DW2 said about the cut and paste signatures on the instruction letters, the relevant instructions bear notation to the effect that confirmation was obtained from SRC and GMSB, as the case may be, for the transfers to be executed. And importantly, as pointed out earlier, neither SRC or GMSB questioned the legitimacy of these instructions or the transfer of the RM42m. Nor did they protest that there had been wrongful debiting or crediting of their accounts. They have been quite content with these transfers, and SRC and GMSB have not raised any issue regarding the lawfulness of these transfer. The only person who is raising the issue about the validity of these transfers is the person who benefited from them, ie the appellant. Whilst the appellant is questioning the validity of these transfers, he has not offered to make amends by retransferring these sums of monies or taking any steps towards it, if these transfers were indeed wrongfully done.

[320] Based on the evidence as a whole, we find the learned trial judge's finding that Nik Faisal had instructed the preparation of the instruction letter, and had affixed the specimen signatures of both himself and that of PW42 to be a reasonable conclusion. Thus, the deafening silence and inaction on the part of SRC and GMSB to the form of the instruction letters and the transfers themselves.

[321] Another issue that the appellant had repeatedly raised is as regards the source of the RM42m. Learned counsel for the appellant had harped on this issue and submitted that the prosecution had failed to prove that the RM42m originated from the RM4 billion KWAP loan to SRC. The learned deputy on the other hand submitted that any money that stands to the credit of SRC

belongs to SRC regardless where it originates from. The evidence is overwhelming that the RM42m came from SRC's accounts. The uncontroverted evidence categorically shows that the RM42m was transferred from SRC through the two conduit companies, GMSB and IPSB, before being deposited into the appellant's bank account. The funds sitting in SRC's bank accounts are the property of SRC and for the purposes of an offence under s 409 of the PC it matters not where those funds originated from. Whether they are shareholder funds, loans or advances from third parties, or profits of the company, they are the company's property.

[322] Thus, we concur with the learned trial judge's finding that there is no substance in this argument. The evidence trail irrefutably establishes the fact of the RM42m that ended up in the appellant's accounts originating from SRC. We agree that the source of the RM42m in SRC is not a concern of the charges. There is no requirement in law for the prosecution to trace and prove the actual source of the RM42m. Suffice for the prosecution to establish the fact of the RM42m being the property of SRC, which they have done.

[323] The appellant also contended that based on the evidence of the appellant, DW2 and DW8, the evidence as a whole supports the inference that all the SRC and GMSB transactions were executed on the instruction of Jho Low for his benefit. The appellant contended that Jho Low and his associates had manipulated AmIslamic Bank, Bank Negara Malaysia, SRC, MOF Inc, and the appellant himself to allow Jho Low to carry out, inter alia, what has been dubbed by the defence as the reversal transactions.

[324] However, it must be noted that according to the appellant's own testimony, the appellant and Jho Low were good friends from 2011 to 2015. There is no evidence of any falling out between the two of them, and hence no reason as to why the appellant was manipulated by Jho Low, and for what purpose. The appellant himself admitted that he had not lost anything and instead gained millions from the monies deposited into his accounts. The evidence shows that it's the appellant and only the appellant, and not Jho Low, who benefitted from the flow of the RM42m.

[325] When the evidence as a whole is scrutinised it shows that Jho Low's role was to ensure sufficiency of funds in the appellant's personal accounts and that is what was done in respect of the RM42m that was moved unlawfully from SRC into the personal accounts of the appellant. The evidence of Joanna Yu (PW54) shows that Jho Low dealt with AmIslamic Bank with the knowledge of the appellant, even though Nik Faisal was the mandate holder. Jho Low's primary task in the scheme of things was to ensure funds were available in the personal accounts of the appellant, for the appellant to draw on them. That much is evident.

[326] The evidence on the role played by Jho Low was comprehensively dealt with by the learned trial judge from paras 1670–1726 of the grounds of judgment, in which every aspect of the appellant's claim as regards Jho Low's role and the appellant's attempt to push blame and culpability to Jho Low was scrutinised with minute care. In these paragraphs, the learned trial judge considered the question of whether Jho Low caused the RM42m transaction for his own purposes, whether Jho Low used sham documents in the scheme of things, whether the CBT of SRC funds was committed by others, whether Jho Low had control over SRC and GMSB and many other related and peripheral issues, before rejecting all these contentions by reference to objectively proved facts, and the inferences drawn therefrom.

[327] The appellant also raised the defence of ignorance, that is he did not know the transactions, balances and sources of his personal accounts as he did not manage them. The learned trial judge considered this defence, which was a principal defence, and proceeded to analyse the appellant's contention that he did not know that the source of funds that entered his personal accounts were from SRC as he did not manage his accounts, and additionally that he believed that the funds were donations from Arab donors.

[328] Once again the learned trial judge had combed the evidence with minute detail before rejecting this contention on the basis of the following facts:

(a) the appellant's sworn admission in his affidavit (P616);

(b) the evidence of PW21 and PW54 showing that at the material time no inquiries, complaints or police reports were lodged in relation to the transactions in the appellant's personal account;

(c) the use of GMSB and IPSB as layering conduits/mechanism for the RM42m transfer;

(d) the appellant's own instruction letter (P277) to AmIslamic Bank;

(e) the Black Berry Messenger ('BBM') messages and chats (P578 and D650) showing the appellant's concern about the status and transactions in his accounts;

(f) the immediate utilisation of RM32m, from the RM42m, to repay PBSB and PPC;

(g) the appellant's overarching control and role as shadow director in SRC; and

(h) the appellant's failure to act even after being informed of the transfer of RM42m into the appellant's account by PW37 and PW49.

[329] Hence, we agree that there is ample evidence to debunk the contention by the appellant that he did not know the transactions, balances and sources of his personal accounts. The BBM messages and chats clearly show that Jho Low and the appellant were in regular communication. In the BBM chats between Jho Low and PW54, reference was made to prior conversations between Jho Low and the appellant. The appellant himself had confirmed this fact.

[330] There is also a correlation between the BBM messages and the appellant's credit card spending in Italy and Hawaii. The appellant admits that the BBM chats showed that Jho Low was in communication directly with the appellant, and through Dato Azlin, with regards the appellant's bank balance so that the appellant could gauge how much he could spend based on the available balance in the accounts. The appellant also admitted that it is the job of Dato Azlin, Nik Faisal and Jho Low to ensure that there were sufficient funds in his bank account to ensure his cheques were honoured. This evidence is contrary to the appellant's contention that he never knew his bank balance for the five years he used the accounts as he had delegated that to his mandate holder.

[331] Despite this evidence the appellant had testified that he only learnt of Jho Low's role in his bank account during the trial. This is patently false and it is completely at odds with his own admission at trial that Jho Low was responsible for ensuring sufficient fund in his personal bank accounts.

[332] The learned trial judge had considered these arguments and analysed the evidence in that regard from para 1727 onwards of the grounds of judgment, and his concluding remarks are found in paras 1822–1825:

> [1822] In any event, as I have set out when examining the issue of the knowledge and dishonest intention of the accused in respect of the CBT charges, the evidence of the BBM chats demolished the version that Jho Low only communicated with the accused very occasionally, when the former is shown to be actively in contact with the accused on matters concerning the sufficiency of funds in the accounts as well as when the accused ran into problems with his credit card purchases overseas. The many BBM chats (in P578 and D650) between Joanna Yu (PW54) and Jho Low thus even show actual knowledge on the part of the accused concerning the status and transactions involving his personal accounts.
>
> [1823] This is because these BBM conversations exhibit situations where Jho Low on-sent messages he received from the accused to PW54, or he sent copies of messages that he delivered to the accused on the account balances (after making the enquiry with the bank). There are also situations where Jho Low informed PW54 of cheques that the accused may be writing, on incoming remittances into the accused's accounts, as well as on proposed transfers by the accused. And there are also situations where Jho Low contacted PW54 upon receiving instructions from the accused.

[1824] I cannot emphasise enough that in exh P277, the accused personally signed off on an instruction letter dated 24 December 2014 for AmIslamic Bank to transfer on 29 December 2014 RM32m from his Accounts 880 and 906 to PBSB and PPC. As stated in the charges and confirmed by bank records and money trail evidence, the RM32m entered Accounts 880 and 906 on 26 December 2014. The accused must have been advised to effect the instructions on the date in question in the expectation that the RM32m would be credited into his two accounts.

[1825] It is simply incredible if the accused claimed not have known about the flow of that much money into his personal accounts and without ascertaining its source, given that he personally wrote the instruction to debit out the same amount of money prior to receiving it.

We find the learned trial judge's analysis of the evidence leading to the above conclusion to be meticulous. There is excellent judicial appreciation of the evidence, from which the learned trial judge draws his inferences and conclusions. We do not find any error that would warrant our intervention.

[333] The learned trial judge proceeded to analyse the appellant's contention that he was not informed of the bank balance of his accounts and found that it is inconceivable that the appellant being the Prime Minister and Finance Minister would be so reckless and irresponsible to not check on the bank balances in his accounts. The appellant could not have been indifferent to the RM42m entering his accounts unless he knew of the same and where it came from. The learned trial judge further found based on the evidence that the only irresistible inference is that the appellant must have known about his account balance and was aware of the transfer of RM42m into his account. The appellant admitted that he knew of the RM2.6 billion that he received in 2011, 2012 and 2013, which were supposedly Arab donations. He also confirmed that Dato Azlin informed him of the alleged fourth Arab donation of RM49m between June and December 2014. But surprisingly the appellant states that he does not know of the SRC's fund of RM42m paid into his account.

[334] Hence, the learned trial judge, in our view quite correctly, concluded that the appellant must have known that the RM42m came from SRC. The appellant was aware of the RM49m in his bank account between June and December 2014 but had actually issued cheques amounting to RM136m, which was more than the RM49m of the supposed fourth Arab donation. Hence, the only logical conclusion is that his spending of RM136m between June and December 2014 would have included the RM42m. It is simply inconceivable that the appellant would have drawn out cheques to the tune of RM136m from his personal accounts without knowing the source of his funds.

Authenticity and admissibility of documents

[335] The appellant at the defence stage raised the issue of the authenticity of the appellant's signature on seven documents tendered by the prosecution, including the letter of instructions (P277). The allegation is that the signature of the accused on the instruction letter (P277) is forged.

[336] The learned trial judge dealt with this issue at para 1878 onwards of the grounds of judgment, and we quote:

> Whether the instruction in P277 is a forgery
>
> [1878] The second point is the allegation that the signature of the accused on the instruction letter in exh P277 is a work of forgery. According to the defence, based on the BBM chats (P578) following Jho Low's request for the transfers be made to PBSB and PPC, on 24 December 2014, PW54 told Jho Low that the transactions would be outside the mandate of Nik Faisal. PW54's suggestion that the same be effected by way of cheque payment could not proceed as Jho Low said the cheque book was with the accused who was then in Hawaii.
>
> [1879] PW54 then agreed to accept a scanned copy of a letter which Jho Low said he would get the accused to sign. At 11am on 24 December 2014, PW54 emailed an initial draft instruction letter to effect the transfer of the RM27m and RM5m from Account 880 and Account 906 to PBSB and PPC respectively. Because PW37 of IPSB was overseas (which delayed the movement of funds from IPSB to the accused's accounts), the draft was amended the value date from 24 December 2014 to 29 December 2014. The final draft was emailed from PW54 to Jho Low and back to PW54 within minutes (between 1600 and 1616 hours on 24 December 2014). PW54 ultimately conceded that she never received a hard copy of P277.
>
> [1880] The defence submitted that the fact that there was no cheque utilised and that the events transpired at a time when the accused was in Hawaii reveals that he was not in the know. The accused was in Hawaii, and attended a golf game with then President Barack Obama in late December 2014. However, due to floods that hit the east coast of Malaysia, he decided to cut short his holiday and return to Malaysia, and on or about 24 December 2014 he would have been in transit back.
>
> [1881] However, in my view, the fact that the instruction in P277 was drafted by PW54 and discussed with Jho Low does not negate the inference that the accused signed on the document in P277. Indeed, it was prepared for the very purpose of obtaining the signature of the accused.
>
> [1882] When PW54 asked about the transfer being made by a cheque payment (naturally to be signed by the accused) Jho Low explained the accused was in Hawaii. This shows the extent of Jho Low's involvement in the management of the accused's accounts which necessitated him being aware of the movements of the accused.
>
> [1883] Further, the fact that the mode of cheque payment was mooted shows PW54 and Jho Low did not exhibit efforts that keep information on the transactions away from the accused. And given modern technology on electronic communication it was nothing improbable about Jho Low being able to procure the signature of the accused who was then in Hawaii or any other location, within even four minutes. In

any event because the accused was overseas, a written instruction to the bank like in P277 was the only solution acceptable to the bank, who could not have possibly accepted a copy of signed cheque from the accused.

[1884] Furthermore, P277 on the face of it carried notations that the transactions were 'confirmed' by Krystle Yap (DW2), and although DW2 in her testimony denied ever confirming the transactions in P277 and merely forwarded the same to the JRC Branch on instructions of PW54, the bank did accept the instruction in P277 and executed the same based on its internal processes. And again, as queried by the prosecution, who would have the audacity to forge the signature of the Prime Minister? This has never been answered, let alone satisfactorily, by the defence.

[1885] The accused testified that he was shown P277 when the MACC took his statement and he confirmed his signature thereon based on the fact that the signature looked like his. However, the defence now says that he was at the time unaware of the matters such as the unavailability of the original instruction letter which were only subsequently led in evidence revealing the circumstances of how P277 was generated.

[1886] The investigating officer (PW57) testified that there was no denial by the accused with respect to the signatures of the accused which are found on the various documents shown to him including P277 during the statement taking session. And it is undeniable that the defence never raised any challenge on the signature of the accused despite the documents having been delivered to the defence under s 51A of the CPC well before the commencement of trial nor mentioned anything to such effect in the defence statement of the accused issued under s 62 of the MACC Act.

[1887] The prosecution did ask the accused whether the fact that RM32m had been credited into and later left his accounts via P277 did not 'ring any bell?' The accused replied that the person who managed the account would have known. This is a curious reply because the issue is the accused himself had earlier confirmed in positive terms to the MACC that he signed and knew about the transfer of the RM32m from his personal accounts to the two companies.

[1888] I find this explanation by the accused lacking in credibility. It has a lot to do with the specificity of the instructions contained in P277. The transfer instruction in P277 which bears the signature of the accused (now disputed by him) as the accountholder giving the instruction to AmIslamic Bank is especially significant in assisting this court to assess the credibility of the testimony of the accused on this issue. P277 refers to a transfer out of two of the accused's personal accounts (Account 880 and Account 906) via two transactions to two companies, namely PBSB and PPC which have nothing to do with MOF Inc. And the amount in total was a staggering RM32m.

[1889] In my view, it simply defies logic for anyone to confirm making the instruction (say, like in this case, by the accused, to the recording officer of MACC) if the contents or subject-matter of the document or letter is so conspicuously unfamiliar to the person, who would under ordinary circumstances have out-rightly at the very first opportunity when confronted with the same, denied having

A anything to do with it. As it turned out later in his testimony, the accused conveniently claimed not to know anything about the transactions, including concerning PBSB and PPC.

B **[337]** Once again the learned trial judge's analysis of the facts is painstakingly meticulous. Indeed its perplexing that the appellant chose to challenge the authenticity of his signature on P277, when he had never denied it at the time when his statement was recorded by the MACC, nor did the defence challenge the appellant's signature on P277 after copies were delivered before trial in accordance to s 51A of the CPC. The appellant confirmed his signature on C P277 with the MACC when he was the sitting Prime Minister, when it was entirely open to him to have disputed it as a forgery, if that was indeed the truth. In this regard it is opportune to refer to the following observation of Abdoolcader FJ in the case of *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ Rep 101 on D proving signatures by circumstantial evidence:

> It is also contended on behalf of the 1st appellant that P17A is documentary hearsay and that the handwriting and signature therein must be proved to be that of the first appellant. The signature or handwriting in a document may be proved by circumstantial evidence if that irresistibly leads to the inference that the person in E question must have signed or written it (*Baru Ram v Prasanni* AIR 1959 SC 93) and a document can also be regarded as evidenced by its contents and the internal evidence afforded by the contents can be accepted as authentication as when it states facts and circumstances which could have been known only to the person to whom the authorship is attributed. The execution or authorship of a document is a F question of fact and may be proved like any other fact by direct as well as circumstantial evidence which must be of sufficient strength to carry conviction (*Krishnabiharilal v State* AIR 1956 MB 86 at pp 90–91) ...

[338] The appellant came about to challenge the authenticity of P277 when G the prosecution did not tender the original of it, but a copy. We would agree with submissions of learned deputy that the appellant is the best person to know whether his signature was authentic or forged. It is rather absurd for the appellant to claim that he became doubtful of his signature only after discovering that the original documents were not tendered as exhibits in court H during trial. Whether the document was original or a copy, the appellant at first sight of the document would have known if the signature was his or otherwise. Thus, if the appellant genuinely believed the signature to be a forgery, it defies logic for the appellant to confirm issuance of P277 when questioned by the MACC, unless he had signed P277.

I

[339] The learned trial judge had considered the evidence of PW54 in relation to the preparation of P277 and the conversation between PW54 and Jho Low as recorded in the BBM chat and ruled that the involvement of PW54 and Jho Low does not negate the inference that the appellant had signed P277. The very

purpose that PW54 and Jho Low spoke about the letter of instruction and prepared P277 was to procure the appellant's signature. The defence contention that the appellant could not have signed P277 as he was in Hawaii at the material time was rejected by the learned trial judge. He observed that whilst the appellant was in Hawaii in late December and attended a golf game with then President Barack Obama, the appellant had cut short his visit and return to Malaysia on or about 24 December 2014, and he would have been in transit when the document was signed and sent to AmIslamic Bank. It is entirely possible for Jho Low to have procured the appellant's signature given the advancement in electronic communication. In this regard, we find that the learned trial judge was entirely correct to have concluded that the signature on P277 is that of the appellant.

[340] The defence also challenged the authenticity of six other documents, namely, P501, P510, P530, P497, D534 and D535. In this regard, the learned trial judge noted:

> [1908] This challenge, like against the instruction in exh P277, is a primary contention of the defence. The key documents which bear what the prosecution say are the signatures of the accused are the shareholder minutes executed by the accused, as MOF Inc. These documents being in effect the resolutions of the shareholder of SRC are crucial to the case of the prosecution, for it is argued that these shareholder minutes show the knowledge if not actual instruction of the accused in respect of matters concerning SRC.

[341] These documents being in effect the resolutions of the shareholder of SRC are crucial to the case of the prosecution. They were evidence necessary for the prosecution to prove control over SRC, especially in respect of the CBT charges. The prosecution also relied on these shareholder minutes show to knowledge, if not actual instruction, of the accused in respect of matters concerning SRC. This was a belated attack by the defence on the authenticity and admissibility of the documents that were the fulcrum of the prosecution case.

[342] During the prosecution case, the defence never challenged the authenticity of the appellant's signatures on these documents, just as in P277. However, during the defence case the appellant made an application vide a Notice of motion for a document examiner from Australia to examine these documents to ascertain whether the appellant's signature on these documents were authentic. After lengthy arguments, the trial judge allowed the application. On 11 and 12 February 2020, Dr Steven J Strach, an expert document examiner from Australia, had in the presence of representatives from both the prosecution and defence conducted a detailed forensic examination of the disputed documents. Dr Strach was then to analyse the documents and present his expert findings in his report.

[343] However, via a letter dated 21 February 2020 the defence informed the trial court that an 'impasse has arisen relating to the terms of Dr Strach's appointment' and that the defence was unable to proceed with Dr Strach, and that there would be no report forthcoming from the document examiner, and that Dr Strach would not be called to testify. Having stated that, the defence did not call any other expert document examiner in place of Dr Strach.

[344] Apart of stating that an impasse had arisen between the defence and Dr Strach, no credible reason was given as to the nature of the impasse that had arisen relating to the terms of Dr Strach's appointment. Since the appellant's contention of forgery of these documents was central to his defence, one would have thought that he would have called another expert in place of Dr Strach. However, no other expert document examiner was called. Whilst, no adverse inference can be drawn against an accused for the non-calling of any witness, such non-calling of a witness may be taken into account by the court in assessing the overall weight of the defence evidence in considering whether the accused had succeeded in raising any reasonable doubt. See *Mahadzir bin Yusof & Anor v Public Prosecutor* [2011] 1 MLJ 297 (FC); *Devinthiran a/l Manni v Public Prosecutor* [2017] 2 MLJ 410 (FC); and *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180.

[345] In this regard, the learned trial judge made pointed observation on the conduct of the defence before deciding to dismiss the appellant's belated challenge on admissibility of these documents. The following excerpt from the grounds of judgment bears that out:

> [1960] This was a deliberate decision of the defence not to adduce the expert report to disprove the genuineness of P277 and the other documents the accused disputed his signatures. The defence has decided to give up on this golden opportunity to call the expert to question the authenticity of the accused's signatures on P277 and other exhibits. This therefore does not progress the defence of the accused.
>
> [1961] For completeness, I should add that there was no denial by the accused earlier is further affirmed by the investigating officer (PW57) in his supplementary affidavit dated 30 December 2019 that the accused had positively and categorically identified his signature without reservation in his statement to MACC. This affidavit is in reply to that of the accused in respect of the latter's application for the relevant exhibits of the disputed documents be made available to his appointed expert document examiner for examination.
>
> [1962] This interesting development, which had earlier witnessed efforts taken by the defence in filing a notice of motion to ensure their expert is allowed to inspect the original documents where the accused is disputing his own signature, the hearing of the said motion with arguments for a whole day which resulted in a favourable outcome to the defence, the full two days of inspection conducted by the expert, all amounted to nothing as the report was never produced before this court.

[1963] Hence, P277 and the shareholder minutes in P497(3), P530(2)-(9), P497(4), P501, D534, D535 and P510 can no longer be ruled inadmissible as their own admissibility was already determined at the close of the prosecution's case. The failure of the defence to rebut the admissibility with the non-production of their expert report will now confirm the genuineness of these documents.

[346] It is obvious that the learned trial judge has given matured and detailed consideration to the issue of authenticity of the documents, and that can be found from para 1909 onwards till 1964 of the grounds of judgment. We agree entirely with the ruling of the learned trial judge and the reasons for that ruling. The appellant testified that the signature on P277 looks like his but wanted the document to be verified by an expert. However, when given the opportunity by the court to do so, over the objections of the prosecution, the appellant failed to fully avail himself of that opportunity. In the premise, the only option open to the trial court is to maintain its earlier ruling on admissibility of these documents. There is no additional evidence adduced by the defence during its case that would warrant the trial court to reconsider the earlier ruling made during the prosecution case on the admissibility of these documents. Thus, we do not find any merit in the appellant's appeal against this ruling.

The issue of the conversion of ID499 to P499

[347] During the prosecution case, the prosecution sought to adduce the minutes of a meeting between the appellant and Nik Faisal on 7 September 2011. This was objected by the defence contending that the meeting never took place, suggesting that it was a fake, and that the other party, Nik Faisal was unavailable to verify it did. The minutes were then marked as ID499. PW39, the then chairman of SRC, testified that ID499 was given to him by Nik Faisal, and that he had kept it in his possession. ID499 was, however, referred to in the meeting of SRC's Board of Directors on 13 September 2011 as recorded in its minutes (P498). Despite being an identification document, ID499 was referred in extenso during the cross-examination of PW39 and the investigating officer (PW57).

[348] Nevertheless, the prosecution agreed that ID499 should remain as it is if no further evidence came to light to change its status. At the defence stage, when cross-examined, the appellant plainly admitted to signing the minutes that is ID499. He not only confirmed the contents of the minutes, but also his signature found therein. Thus, the very basis of the defence objection to the admissibility of ID499 had vanished. Therefore, based on this additional evidence elicited during the defence case, the learned trial judge had ruled to convert ID499 to P499, by which it became properly admitted documentary evidence.

[349] In the course of this appeal, learned counsel for the appellant submitted that the learned trial judge had erred in his decision to convert ID499 to P499 during the defence stage. We do not agree with that contention. Now, there is no rule that prohibits the prosecution from adducing any documents as evidence during the defence stage. At times it is only during the defence stage that the prosecution may get the opportunity to tender a document in evidence, as for example when the maker of that document is called as a witness for the accused, or is the accused himself.

[350] The admissibility of documents may be objected to by the defence on evidential and procedural rules when they are sought to be admitted during the prosecution stage. If there is substance to such objection then the documents may be marked as 'ID' or 'identification documents', which is the general practice in our courts. If in the course of the trial, whether at prosecution or defence stage, evidence is adduced to overcome the earlier procedural or evidential objection then it would be incumbent upon the court to overrule the objection and convert the exhibit from an 'ID' to a properly admitted 'P' document of the prosecution. The same would apply if the defence had sought to admit a document during the prosecution stage and objected to by the prosecution, and subsequently have it properly adduced at the defence stage when the objection to admissibility is overcome. And here that is exactly what had transpired, as noted by the learned trial judge:

> [1969] As such, I now rule that taking cognizant that both parties had conducted their case fully aware of the existence of ID499, which contents and signature were confirmed by the accused in his cross-examination, the same should be converted to prosecution exh. P499. This evidence further confirms the prosecution's case, including as elicited from its witnesses such as PW39 and PW42 that the accused exercised control of SRC through its Board of Directors by way of the issuance of shareholders minutes and other directions conveyed through Nik Faisal.

[351] We do not find anything amiss in that ruling. That ruling is well within the law. In *Bank of Tokyo-Mitsubishi (Malaysia) Berhad v Sim Lim Holdings Berhad & Ors* [2001] MLJU 125; [2001] 2 CLJ 474, when faced with a similar situation, Ramly Ali J (as he then was) had ruled at the end of the trial on admissibility of plaintiff's documents which the defendants had earlier objected, and quite correctly we would add, when the objection could no longer be sustained. The High Court held as follows:

> The counsel for the second and third defendants also submitted that all those documents are only marked as 'ID' and thus only for identification purposes and are not admissible evidence. I cannot agree with the counsel on that point. From the records of the proceedings, it seems that the plaintiff had attempted to produce all those documents as evidence but was objected to by the counsel for the second and third defendants. Thus, the court had to decide on the admissibility of all those documents at the end of the trial after hearing all the relevant circumstances of the

> case. At that stage of the proceedings, all those documents have to be marked as 'ID' first, but it does not stop the court from deciding on their admissibility at the end of the trial ie, during submissions stage. Section 73A(2) of the Evidence Act 1950 empowers the court to do so. The said subsection provides for the exercise of the power 'at any stage of the proceedings, having regards to all the circumstances of the case'. There is nothing to say that those documents cannot be admitted as evidence under s 73A(2) just because they have only been marked as 'ID'.

We are in agreement with the above High Court decision and affirm the principle that admissibility of evidence, which hitherto had been objected, can be decided upon by the court at any stage of proceedings, and up till the end of trial, when the objection to their admissibility is no longer sustainable.

The appellant's belief of the Arab donations

[352] The issue of the Arab donations had surfaced many a time in the course of the trial and in this appeal. The appellant contends that he was led to believe that the remittance from the Saudi Royal based on the fourth Arab letter (D604) had entered his accounts. According to the appellant the Arab donations were a pledge of support from the late King Abdullah of Saudi Arabia, which occurred at a personal meeting that was arranged by Jho Low, who according to the appellant enjoyed a close relationship with the Saudi Royal family. This meeting is said to have been held in January 2010 in Riyadh, Saudi Arabia, where the appellant met the Saudi monarch with several individuals from Malaysia. The appellant called Datuk Professor Syed Omar Al-Saggaf (DW4), Mejar Jeneral Dato' Seri Jamil Khir (DW5) and Datuk Seri Panglima Anifah Aman (DW6), the people who the appellant said attended that meeting, to corroborate his evidence on this.

[353] In this regard, the learned trial judge summed up this defence as follows:

> [2044] The defence submitted that the circumstances and events established by the evidence supports the inference of the accused holding a bona fide and reasonable belief that the funds in his accounts in 2014 and 2015, being the material period for the CBT and money laundering charges, were further Arab donations intimated by Jho Low to have been remitted, and reflected in the fourth donation letter of D604 based on the following:
>
> (a) the circumstances and events from January 2010 up to 2015 relating to the pledge of support, the manner in which the remittances were made, the intimations from Jho Low and the production of supporting letters;
>
> (b) events which fortified the perception of Jho Low's authority from the Arab Royalty and role as a conduit to facilitate the donations from 2011 to 2014;
>
> (c) the continuous reporting of the remittances and the supporting letters from 2011 to 2014 to AmBank, BNM and the Central Bank Governor

personally and the transparency of the transactions further fortified the belief on the genuineness of the donations;

(d) the circumstances in 2014 and 2015 were as had prevailed since 2011 and there was no occurrence which could have reasonably raised any cause to suspect that the 2014 transactions were different from the previous 2011 to 2013 donations. There was no cause to query the source of the funds as the circumstances as a whole led to the belief that the funds in the account in 2014 were a further instalment of similar donations made previously in 2011, 2012 and 2013;

(e) the belief was caused to be maintained by inter alia ad hoc confirmations by Datuk Azlin prior to issuances of big cheques and all cheques issued from 2014 to 2015 being honoured;

(f) other events which transpired including verification of the D601 to D604 letters from Prince Saud and confirmation of entities such as Tanore Finance Corp. and Blackstone Asia Realty Partners being nominees of the Arab Royalty;

(g) the conduct of the accused throughout the period was consistent with the belief that funds in the accounts from 2011 to 2015 were all from Arab donations, in view of the following:

(i) His requests to adhere to all rules and regulations when the earlier Account 694 was opened;

(ii) His understanding of complete reporting;

(iii) The utilisation of some 99% of RM1 billion from the 2011 to 2013 donations were for CSR initiatives and the 13th General Elections;

(iv) The return of the unutilised donations of USD620m in 2013;

(v) The impetus for opening the Accounts 880, 898 and 906

(vi) The continued utilisation of funds primarily for CSR initiatives throughout 2014 to 2015.

[2045] The defence thus submitted that in view of the above, the accused's belief that the funds in his accounts in 2014 and 2015 were from donations made at the behest of the Arab Royalty is a reasonable inference which can be drawn from the evidence as a whole.

[354] However, when the evidence of the defence is scrutinised we notice that there are material contradictions in the evidence of the appellant and his witnesses, and there are doubts as to whether the meeting actually took place in January 2010, and whether King Abdullah actually promised financial support to the appellant that would be channeled direct to the appellant's personal accounts. Only DW5, who spoke Arabic, purportedly heard the late King's promised offer of financial support. This was supposedly made at the official meeting between 13–16 January 2010. However, DW6 contradicted DW5 when he said that the offer was made at the arranged meeting on 11 January

2010 and not the official meeting between 13–16 January 2010. And in contrast to this, the appellant himself said that he only knew about the Arab donation in mid 2010 when told of it by Jho Low. The learned trial judge decided that the discrepancies in the appellant's evidence cannot be reconciled with the evidence of DW5, who additionally did not know Jho Low.

[355] Further, though DW4, DW5 and DW6 were said to be privy to the private discussion that allegedly took place between King Abdullah and the appellant in January 2010, the evidence of both DW4 and DW6 could not verify the evidence of DW5, as they were only subsequently informed of it by the appellant. In fact the very attendance of DW5 at the alleged meeting was questionable as there was evidence to show that he was in Malaysia during those dates. The learned trial judge after having considered the defence evidence in this regard found that the appellant should have taken steps to verify the truth of the information regarding the financial donation allegedly made during the meeting in Riyadh, which he did not. The appellant had merely relied on what was purportedly told to him by Jho Low about the donation from the Saudi King. The appellant himself did not hear of this donation being offered by the Saudi King. This lack of confirmation from official channels is very telling about the truthfulness of this defence, and the trial judge noted this too.

[356] We would thus agree with submissions of the learned deputy that the differing versions of this Arab donation story between the witnesses makes unbelievable this defence of the appellant, that he honestly believed the flow of funds into his personal accounts were from Arab donations.

[357] There is lengthy analysis of the evidence and all aspects of this Arab donation story has been taken into consideration by the learned trial judge. We find the judicial appreciation of evidence and the application of it to the law by the learned trial judge to be not just complete but covers every nook and cranny of the defence contention and the prosecution's rebuttal. After this rather exhaustive analysis of the evidence, the learned trial judge concluded:

> [2277] In my judgment, from the evidence it is quite plain that the accused could not have honestly believed the Arab Royalty donation story, especially vis a vis the fourth letter fund (D604) to present him with a defence that he did not know of the RM42m paid into his account because he thought he was spending on the Arab funds. As has been made demonstrably clear, this defence is unsustainable because it is wholly contrived.
>
> [2278] Quite apart from the remittances pursuant to the three letters in D601, D602 and D603 during the years 2011, 2012 and 2013 which the defence argues the accused honestly believed to have been from King Abdullah — which I have shown to be unsupported by evidence and plainly false, the remittance in 2014 was even more indefensible because the accused himself had in 2013 returned the

balance USD620m to the donor whom the accused did not know but conveniently assumed to have been King Abdullah after the conclusion of the 13th General Elections, and for the other questionable aspects surrounding this alleged fourth donation, which have been highlighted.

[2279] It seems that as for the fourth letter (D604) despite the full amount of funds promised never materialised, the accused seemed contented for as long as the exact amount of funds needed arrive at the moment it was most needed to address insufficiency of balances in his accounts. The accused appeared unperturbed as to why the full amount was not flowed into his account, much less if it was actually from King Abdullah. Further, the letter in D604 does not name the entity that will be giving the funds to the accused unlike the previous donation letters.

[2280] As such the contention that the accused had a bona fide belief of the purported Arab donations arriving in 2014 through the fourth letter in D604 as being consistent with the earlier received funds during the years 2011 to 2013 does not pass muster the threshold of not only the requisite evidential support but also of the basic logic and common sense.

[358] We must add that having considered the evidence and submissions, we find that the learned trial judge's above conclusion is well supported and derived from a comprehensive exercise in judicially appreciating and analysing the evidence through logical thought process, and we do not find any error that would warrant our appellate intervention. The learned trial judge concluded that the evidence as a whole does not support the appellant's belief of the Arab donation being the source of funds, ie the RM42m, but rather shows that the defence was contrived. We are of the same opinion. Thus, we agree that this defence sits in a bucket full of holes that does not hold water.

[359] The learned trial judge rightly found that the entire narrative of the Arab donations was a weak fabrication and self-serving evidence. In this regard, he added that:

[2419] On the totality of the evidence I do not therefore accept that the circumstances and the events I have earlier discussed in detailed fashion support the inference that the accused was under the honest knowledge and reasonable belief that the funds in his accounts in 2014 and 2015 pertinent to the charges against him were further Arab donations as reflected in the 'Arab letter' dated 1 June 2014 (D604).

We note that the learned trial judge had considered every aspect of the defence raised by the appellant in respect of the CBT charges. The learned trial judge rightly held that the appellant was an agent, ie a director by virtue of his overarching control over SRC and the Board of Directors, who was entrusted with dominion of property belonging to SRC, ie the RM42m, which he dishonestly misappropriated and converted for his own use, resulting in wrongful gain to him and wrongful loss to SRC. The appellant had failed to

raise any reasonable doubt in the prosecution's case. Based on the evidence as a whole, we find that the learned trial judge did not err in making the finding at the end of the defence case that the prosecution had proved the CBT charges beyond any reasonable doubt. Hence, we find that the appellant's conviction on all three CBT charges is safe.

The defence on the three money laundering charges

[360] The learned trial judge summarised the defence contention as regards the three AMLA offences as follows:

> [2662] The crux of the defence of the accused on the three money laundering charges is twofold. First is the key contention that the predicate offences of CBT and abuse of position have not been proved. Secondly, the mental element has not been established against the accused and there is no wilful blindness. In other words, the defence submits that two ingredients of the money laundering offence have not been proved beyond reasonable doubt.

As for the appellant's first contention, this has already been covered in the earlier part of this judgment and we do not intend to traverse the same arguments once again. We would just need to consider if any evidence adduced during the defence case raises any reasonable doubt in the prosecution's case on the three AMLA charges.

[361] In this regard, the appellant contended that based on the evidence adduced by the appellant, the doctrine of wilful blindness does not apply as there were justifiable grounds for the appellant not taking steps to ascertain the provenance of the RM42m. The appellant further contended that the evidence as a whole established a favourable inference that the belief and state of knowledge of the accused was reasonably sustained throughout the material time and therefore there is no established cause for reasonable suspicion to be raised to the contrary, such that he would be put to enquiry.

[362] The learned trial judge summarised this position of the defence at para 2669 of the grounds of judgment, as such:

> [2669] It is the contention of the defence that the doctrine of willful blindness cannot be applied given that the belief held by the accused on the Arab donations was a favourable inference established in the evidence for the reasons that have been raised and discussed earlier, by which the defence meant that the circumstances that were prevailing or appeared to be prevailing throughout the material period from 2011 up to 2015 reasonably justified the accused's continued belief on the existence of further Arab donations in 2014.

[363] The learned trial judge once again dismissed this defence of the appellant which was essentially based on the alleged Arab donations, and his

alleged honest belief that the funds that entered his personal bank accounts were from Arab donations. There is as usual very lengthy consideration by the learned trial judge of the appellant's contention that the doctrine of wilful blindness does apply to him. Following that discourse, the learned trial judge concluded:

> [2688] As such, any assertion that the circumstances prevailing provided no cause for suspicion to arise and the accused reasonably did not have cause to enquire into any particular transaction during the material period is absolutely perverse given the wealth of evidence to the contrary.
>
> [2689] Further, I have also found that the defence of the accused that he had no knowledge on the account balances and the source of funds because he tasked the management of his personal accounts, particularly on ensuring sufficiency of funds in the same to Jho Low, Datuk Azlin and Nik Faisal to be similarly contrived and does not raise any reasonable doubt on the case of the prosecution that the accused instead had knowledge of the same as demonstrated by the evidence discussed earlier.
>
> [2690] The arguments that on the further donations from the Arab Royalty pursuant to D604 in 2014, the circumstances appeared to be the same as and not differentiated from the past three years is patently untrue, as is the theory that the sheer large volume and frequency of the transactions throughout 2011 to 2015 (where hundreds of cheques from Account 694 had been issued and cleared) lacks credibility. Nor less believable is the contention that no personal cheques of the accused had ever been dishonoured because Jho Low, in subterfuge, wanted to maintain the appearance that the circumstances in 2014 were the same as prevailing since 2011. All these have been discussed earlier in the section on CBT, where it has been established that the cheques never bounced because the three were tasked to ensure they never did, and the accused was assured of the same, which indeed was the case.

[364] In the overall, the learned trial judge rejected the appellant's contention and said 'any assertion that the circumstances prevailing provided no cause for suspicion to arise and the accused reasonably did not have cause to enquire into any particular transaction during the material period is absolutely perverse given the wealth of evidence to the contrary'.

[365] We find that the learned trial judge's conclusion that there was cause for suspicion and that there was a concomitant duty on the appellant to make reasonable enquiry into the transactions resulting in the flow of the RM42m into his personal accounts in well supported by evidence.

[366] The doctrine of wilful blindness as applied within the regime of the anti-money laundering laws, specifically s 4(2) of the AMLA (s 3 of the previous Act), was very well explained by Abang Iskandar JCA (now Chief Judge of Sabah and Sarawak) in *Azmi bin Osman v Public Prosecutor and*

another appeal [2016] 3 MLJ 98; [2015] 9 CLJ 845:

> [35] ... With respect, we agree with the learned deputy on this issue on the true effect of paras (aa) and (bb) being the mens rea element in the definition of money laundering under s 3 of the AMLATFA.
>
> [36] Those paras (aa) and (bb) define the mens rea necessary to turn the preceding actus reus (conduct) into a money laundering offence. It does not excuse wilful blindness on the part of the accused person. There is no room for safe harbours, where proceeds of an unlawful activity may find itself quietly nestling in so-called bank accounts of 'innocent' account holders. A bank account holder must be vigilant and must take steps to ensure that monies that are received in his account are not proceeds of any unlawful activity and that he knows that the source of those monies is lawful, lest he runs afoul of AMLATFA and runs the risk of being charged for an offence of money laundering.
>
> The doctrine of wilful blindness imputes knowledge to an accused person who has his suspicion aroused to the point where he sees the need to inquire further, but he deliberately chooses not to make those inquiries. Professor Glanville Williams has succinctly described such a situation as follows: 'He suspected the fact; he realised its probability but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone is wilful blindness'. (Glanville Williams, *Criminal Law 157* (2nd Ed) 1961). Indeed, in the context of anti-money laundering regime, feigning blindness, deliberate ignorance or wilful ignorance is no longer bliss. It is no longer a viable option. It manifests criminal intent.

[367] Now, when that legal principle is applied, we agree with the learned trial judge that the evidence overwhelmingly shows that the appellant as the account holder of the two accounts into which the RM42m flowed had not been vigilant or taken measures to ensure that the funds received in his account were not proceeds of any unlawful activity and that he knows that the source of those funds is lawful. The appellant did not take any proactive steps in this regard. As such, we do not find any error on the part of the learned trial judge when he concluded as follows:

> [2695] I do not think that given the facts and evidence as stated, as the account holder the accused in the instant case before me could be said to have been vigilant and taken steps to ensure that the RM42m received in his accounts are not proceeds of any unlawful activity and that he knows that the source of those monies is lawful. The circumstances which in this case so patently aroused suspicions in an overwhelming fashion lead only to the irresistible conclusion that the accused deliberately chose not to question and probe substantive questions that plainly required verification, so that he could deny knowledge.
>
> [2696] This is wilful blindness. And the law treats this as knowledge. In any event, the mens rea or the mental element of the offence under 4(1) is specified in s 4(2) which has been satisfied. The only other plausible explanation is that the accused actually knew from day one that the whole King Abdullah donation narrative was

an elaborately orchestrated invention intended to subvert the truth and was totally devoid of merit.

[368] The doctrine of wilful blindness will be applicable only if there has arisen reasonable cause of suspicion, and the accused does not take any step to investigate further and dispel the suspicion. Here, the facts and evidence show that the funds could not have originated from the Saudi King. The reason for that finding is well set out in the lengthy analysis of evidence by the learned trial judge. Nevertheless, the appellant did not take any steps to investigate the flow of funds into his accounts. He seems to have placed reliance on what Jho Low had told him as to the source of the funds and nothing else. He was the sitting Prime Minister at the material time and he had every opportunity, including official government channels, to make enquiries and confirm if indeed the funds came from the Saudi monarch. Not a single step was taken by the appellant to ascertain or verify the truth of the source as intimated to him by Jho Low, allegedly. This is classic wilful blindness. When one is wilfully blind, then either limbs of s 4(2) of the AMLA would apply, and that reads:

> (2) For the purposes of subsection (1), it may be inferred from any objective factual circumstances that —
>
> (a) the person knows, has reason to believe or has reasonable suspicion that the property is the proceeds of an unlawful activity or instrumentalities of an offence; or
>
> (b) the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is the proceeds of an unlawful activity or instrumentalities of an offence.

[369] In this regard, we agree with the learned trial judge that the appellant's contention that he had justifiable reasons not to suspect anything untoward in the flow of the RM42m into his accounts is simply flawed. The appellant had deliberately shut his eyes and chose not to verify the origins of the funds, but instead relied wholly on others, whilst at the same time spending such funds, including the RM42m for his own purposes and benefit.

[370] Of course, the appellant would not have any reason to be suspicious of the source of the funds if he knew the actual source, which the evidence indicates that he did. In this case, apart from the application of the doctrine of wilful blindness, there is evidence showing that the appellant knew the actual source of the funds. The facts and evidence as relevant to the dishonest intention and knowledge for the CBT charges also warrant the inference that the appellant knew that the RM42m that flowed into his accounts were from SRC, and by virtue of that s 4(2)(a) of the AMLA is applicable.

[371] In the premise, we find, just as the learned trial judge did, that the

prosecution has proved all the three money laundering charges under s 4(1)(b) of the AMLA beyond reasonable doubt. We find that the appellant's conviction on the three charges under s 4(1)(b) of the AMLA is safe.

The right of the appellant to be provided with statements recorded by the investigation agency from potential witnesses when defence is called

[372] Before we conclude there is one other matter that needs to be dealt with. The appellant filed a notice of motion (Criminal Application No WA-44–290–11 of 2019) and sought the following orders from the High Court after his defence was called:

(a) an order that the prosecution do forthwith and in any event not later than 24 hours from the date of this order deliver to the solicitors acting for the appellant a list with the names, details, designations and contact information of all persons from whom information, records of examination, written statements on oath and/or affirmation have been obtained and/or recorded by the MACC and/or other investigation agency ('List') in relation to the investigations which have culminated into the subject matter of the present proceedings (WA-45–2–07 of 2018, WA-45–3–07 of 2018 and WA-45–5–08 of 2018) ('Investigations');

(b) an order that the prosecution elect and justify whether the persons listed in the List are either being offered to the defence to be cross-examined or are being made available to the defence to call as defence witnesses if the defence so decides, save for witnesses who have already testified during the prosecution case and/or persons which the Investigating Officer (PW57) has testified are untraceable, dead and/or cannot be found;

(c) an order that the prosecution do forthwith and in any event not later than 24 hours from the date of this order deliver to the solicitors acting for the appellant all records of examinations, written statements on oath and/or affirmations ('Statements') obtained and/or recorded by the MACC and/or any other investigation agency from the persons which the Investigating Officer (PW57) has testified are untraceable, dead and/or cannot be found; and

(d) an order that upon the defence providing the prosecution with the names of persons on the List which the defence has elected to cross-examine and/or call as a defence witness (as the case may be), the prosecution shall forthwith and in any event no later than 24 hours therefrom, provide the defence with statements obtained and/or recorded by the MACC and/or any other investigation agency from the said persons and/or any one or more of the said person as this honourable court deems fit.

[373] This application was dismissed by the learned trial judge. The grounds of judgment for that decision is found at p 11 of *rekod rayuan* (*Tambahan* 1) (Vol 6). This application is similar to the pre-trial application by the appellant for, among others, the production of written statement of witnesses recorded by MACC officers in the course of investigation and the list of witnesses. This application was dismissed by the learned trial judge for reasons found in the grounds of judgment reported as *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya* [2019] MLJU 190; [2019] 5 CLJ 93, which was confirmed by the Court of Appeal and the Federal Court in *Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor* [2019] 4 MLJ 180; [2019] 5 CLJ 23, and *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya* [2019] MLJU 282; [2019] 1 LNS 434, respectively.

[374] The Federal Court has authoritatively settled the law that once the prosecution has established its case, there is no obligation in law to call a particular person as a witness or to offer any witness or a list of witnesses to the accused. See: *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717. Likewise the Court of Appeal in *Ng Tiam Kok & lain-lain lwn Pendakwa Raya* [2013] 1 MLJ 342 held that where the prosecution had established a prima facie case there is no requirement in law for the prosecution to offer any persons not called as their witness to the defence nor to make them available to the defence. The Court of Appeal had adopted and applied the principle enunciated by the Singapore Court of Appeal in *Chua Keem Long v Public Prosecutor* [1996] 1 SLR 510:

> Out of a number of witnesses, it may then only be necessary to bring in one or two; as long as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all of the rest should be called, nor why any presumption should be drawn that the evidence of those witnesses not produced would have been against the prosecution.
>
> In such circumstances it is not necessary for the prosecution to offer or make available the remaining witnesses to the defence.

See also: *Satli bin Masot v Public Prosecutor* [1999] 2 SLR 637; *Pendakwa Raya v Mansor b Mohd Rashid & Anor* [1996] 3 MLJ 560; and *Lee Lee Chong v Public Prosecutor* [1998] 4 MLJ 697 for similar pronouncements of the law.

[375] Now, if there is no obligation to make available any witness to the defence at the close of prosecution, then correspondingly there can be no obligation to provide the statement of that witness made to the investigation authority. Nor would there be an obligation to provide the list of witnesses.

[376] Thus, in respect of this application the learned trial judge held in his grounds of judgment:

[27] As such, I am constrained to incline to agree with the submission of the prosecution that once this court at the close of the prosecution case ruled that the prosecution had proved a prima facie case and did not in that ruling hold that the prosecution had failed to call any particular witness, it is not open for the accused to ask for any particular witness to be called or for the full witness list to be supplied. Taking cognisant also, of the law as I have just stated, there is no valid basis to contend that there is an absence of any legal rules governing the issue so as to justify the invocation of s 5 of the CPC.

[28] The requests as contained in prayers 1 and 2 of this application cannot therefore be acceded to by this court. The accused, as the applicant herein cannot therefore ask for any particular witness be offered or for the list of witnesses be supplied to the defence.

[29] I should also add that the other reason why this application of the full list of the witnesses cannot succeed is this. In this same prosecution against the accused, an earlier application for a list of witnesses and for statements from all potential witnesses had been refused by this court (see *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya* [2019] MLJU 190; [2019] 5 CLJ 93). This dismissal was affirmed by the Court of Appeal (see *Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor* [2019] 4 MLJ 180; [2019] 5 CLJ 23) and the Federal Court (see *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya* [2019] MLJU 282; [2019] 1 LNS 434) ...

[377] Nevertheless, at close of prosecution case the prosecution offered 66 witnesses to the defence to be called as defence witnesses, if they chose. They were, however, not offered to the defence for cross-examination. The appellant has a choice, ie to indicate to the court which of the 66 witnesses offered were required by the defence to be called as their witness. However, the appellant contends that since 193 potential witnesses had provided statements to the MACC and the prosecution only called 55 of them, the defence has the right to call any of the balance of 138. Hence, the essence of the appellant's contention is that all or any of the remaining 138 persons indicated as required by the defence must be made available to the defence together with their statements recorded by the investigating authority.

[378] Learned counsel for the appellant submits on the strength of this court's pronouncement in *Siti Aisyah v Public Prosecutor* [2019] 4 MLJ 46; [2019] 7 CLJ 27 that the appellant has a right to the statements of all those offered witnesses that the defence wants to call. However, with respect, we are by the doctrine of stare decisis bound by the ratio decidendi in *Husdi v Public Prosecutor* [1979] 2 MLJ 304, where the Federal Court had held statements recorded by the police, and by extension any other investigating body such as the MACC, from potential witnesses in the course of investigations are privileged. The Federal Court had as a matter of policy stated that such statements are privileged from disclosure. In this regard, we concur with the findings of the learned trial judge that he too is bound by the pronouncement

of the Federal Court in *Husdi v Public Prosecutor* and that the statements of witnesses offered to the defence are privileged from disclosure for the reasons stated in the learned trial judge's grounds of judgment, which we find states the correct position in law. Suffice to say that we find the reasons given by the learned trial judge for the dismissal of the appellant's application to be well grounded in law and is the correct position in law, in light of the Federal Court's pronouncement in *Husdi v Public Prosecutor* and *Dato' Sri Mohd Najib bin Hj Abd Razak v Pendakwa Raya* [2019] MLJU 282; [2019] 1 LNS 434, which affirmed this court's judgment in *Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor* [2019] 4 MLJ 180; [2019] 5 CLJ 23. Thus, we do not find any reason for appellate intervention.

CONCLUSION ON THE APPEAL AGAINST CONVICTION ON ALL CHARGES

[379] Wherefore, we dismiss the appellant's appeal against conviction on all seven charges and affirm the High Court's conviction of the appellant on all seven charges.

Appeal on sentence

[380] The appellant had appealed against sentence, and there was a cross appeal by the public prosecutor as well. However, the public prosecutor withdrew the cross appeal, and hence only the appellant's appeal against sentence was heard by this court.

[381] The learned trial judge heard submissions in mitigation of sentence, and duly noted the following:

> [2862] Nevertheless, within the claim of such constraints, the defence began the plea of mitigation proper by highlighting the background and achievements of the accused as a politician. This is, of course, well documented.
>
> [2863] Although not mentioned by the defence, the accused is the eldest son of the country's second Prime Minister.
>
> [2864] The accused is one of the Four Noblemen in the Royal Court of the State of Pahang. The accused graduated in Industrial Economics from the University of Nottingham. He became the youngest deputy minister when he was appointed as the Deputy Minister of Energy, telecommunications and post at the age of 25, and was subsequently made the youngest Chief Minister of a state when appointed as the Menteri Besar of Pahang in 1982 at the age of 29. He was made a full Cabinet minister in 1986 as the Minister of Culture, youth and sports. The accused held various ministerial portfolios in the period thereafter and in 2004 he ascended to the position of the Deputy Prime Minister. In 2008 as the Deputy Prime Minister, he was also appointed as the Finance Minister.

[2865] In 2009, the accused became the sixth Prime Minister of Malaysia, and relinquished office following the loss of the ruling coalition party that he led in the country's 14th General Elections on 9 May 2018. He resigned as the President of UMNO and Chairman of BN on 12 May 2018. Since 9 July 2019, the accused is the Chairman of the BN Advisory Board.

[2866] The accused does not have any record of any traffic summons, let alone any conviction for any offence. He had extended his full cooperation to the authorities since his involvement in the 1MDB controversy became public in 2015. He had given three statements to the MACC and a few others to the RMP. He continued to cooperate in 2018 even though the previous attorney general had already cleared him of any criminal wrongdoings in January 2016. During his tenure as the Prime Minister, the accused had agreed to the setting up of the Public Accounts Committee (PAC), a select committee of the House of Representatives in the Parliament of Malaysia to inquire into the 1MDB matter and there was never any allegation that he had tampered with any of the witnesses summoned by the PAC.

[382] Learned counsel for the appellant had concluded his submission by asserting that the higher the status of an accused, the more grave and serious the fall he suffers, and that is already his punishment. And contends that the fall from grace of the appellant, who at one time held the highest political office of the land as Prime Minister, and head of government, is punishment enough.

[383] The learned deputy on the other hand alluded to the very serious nature of the offences and the manner of commission of these offences by the appellant as the then sitting Prime Minister and Finance Minister. The learned deputy submitted as recorded by the learned trial in his grounds of judgment:

[2877] Learned lead prosecutor started by emphasising that the law is above the most powerful, and that this is also a manifestation of art 8 of the Federal Constitution that clearly states that all persons are equal before the law. This is a precedent creating case that should be a strong deterrent against crimes committed by the holder of the high office of the Prime Minister in this country.

[2878] It is contended the sentence should reflect that this is the 'worst case imaginable' for the offences, more so since this case has tarnished the image of the country and also that no steps were taken by the accused to return the RM42m which belonged to SRC.

[2879] In respect of the offence under s 23 of the MACC Act, and its precursor, this is the first time a person was charged for acts done when he was the serving Prime Minister, and is undoubtedly without precedent in the sense that previous convictions of high ranking politicians could not be considered to be in the same league as the Prime Minister of the country. Notably, the case of *Public Prosecutor v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 CLJ 215 involved a Deputy Prime Minister, whilst the decisions in *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240; [1977] 1 LNS 24 and *Mohd Khir Toyo lwn Public Prosecutor* [2013] 4 MLJ 801; [2013] 5 CLJ 323 both concerned the Menteri Besar of Selangor, and in *Hj Abdul Ghani Ishak & Anor v Public Prosecutor*

A [1981] 1 LNS 96; [1981] 2 MLJ 230, *Public Prosecutor v Dato' Waad bin Mansor* [2005] 2 MLJ 101; [2005] 1 CLJ 421, *Datuk Sahar bin Arpan v Public Prosecutor* [2007] 1 MLJ 697; [2007] 1 CLJ 326, and *Public Prosecutor v Dato Haji Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245; [1982] 1 LNS 71 all involved State EXCO Members or Assemblymen.

B [2880] Learned lead prosecutor submitted that these authorities made it clear that the sentences for corruption offences should act as a deterrent and that loss of political career is far from being an extenuating circumstance. This court was referred to the following passages in the case of *Public Prosecutor v Dato' Waad bin Mansor* [2005] 2 MLJ 101; [2005] 1 CLJ 421 where the Federal Court stated the

C following:

> 71. In our opinion, in cases of corruption it is difficult to envisage a situation where public interest does not require the principle of deterrence to predominate. In *Lim Poh Tee v Public Prosecutor* [2001] 1 SLR 674, it was held that the principle of deterrence dictated that the length of the custodial sentence
>
> D awarded had to be a not insubstantial one in order to drive home the message that such offences would not be tolerated; but not so much as to be unjust in all the circumstances of the case. In this regard, the culpability of the offender, the circumstances of the offence, the aggravating and mitigating factors, and the sentences imposed in similar cases would be relevant considerations.
>
> E 72. Reverting to the present appeal before us, it is our view that very little emphasis has been placed by the CA in their judgment on the aforesaid principles of sentencing.
>
> 73. The CA had placed much emphasis on the fact that the respondent's political career is destroyed, the positions he once held lost and possibly never to be
>
> F recovered and his good name tarnished. With respect, these are by no means extenuating circumstances which could attract sympathy. These in fact are considerations that the respondent should have in mind before he embarked upon this nefarious scheme and they certainly should not have an overwhelming effect on the sentencing process as held by the CA.
>
> G 74. As we have quoted earlier in this judgment, the aim of the Ordinance is to bring to book renegade politicians and public servants who abuse their positions. The effect of any punishment imposed is to deter politicians and public servants from conducting their public affairs in a corrupt manner (see *Public Prosecutor v Dato Haji Mohamed Muslim bin Haji Othman*).

H ...

[2883] In relation to the offence of CBT in the three charges, the prosecution highlighted a number of cases, which included *Aisyah bt Mohd Rose & Anor v Public Prosecutor* [2016] 1 MLJ 840; [2016] 1 CLJ 529 where the sum involved was

I RM1.5m which landed a jail term of five years to the accused; *Che Hasan Senawi v Public Prosecutor* [2009] 1 MLJ 55; [2008] 5 CLJ 769, *Sim Gek Yong v. Public Prosecutor* [1995] 1 SLR 537, *Public Prosecutor v Muthu Lingam* [1986] 1 MLJ 432; [1986] 1 CLJ 78; [1986] CLJ Rep 603, *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167; [1987] 2 CLJ 405; [1987] CLJ Rep 209; *Wong Kai Chuen Philip v Public Prosecutor* [1991] 1 MLJ 321; [1990] 1 LNS 146 and

Public Prosecutor v Khairuddin Hj Musa [1982] 1 MLJ 331; [1981] CLJ 86A; [1981] CLJ Rep 234 (CBT of RM20,000 by a credit controller of a bank, sentenced to 18 months of imprisonment and fine of RM2,000).

[2884] And as for the money laundering charges, the prosecution refers to the Court of Appeal decision in *Azmi bin Osman v Public Prosecutor and another appeal* [2016] 3 MLJ 98; [2015] 9 CLJ 845 where the accused was a Deputy Superintendent of Police in charge of combating vice activities, including illegal gambling but had instead abused his position of trust and obtained illegal gains. He was sentenced to two years imprisonment for each of the four charges of money laundering which were ordered to run consecutively, and was also fined.

[2885] The prosecution concluded its submissions by reiterating that the instant case is a near worse-case scenario situation and urged the court to mete out a sentence that would incorporate the elements of deterrence and retribution.

[384] Having heard both learned lead counsel for the appellant and the learned deputy, the appellant was also with leave of the trial court allowed to directly address the court on the issue of sentence. The essence of the appellant's personal mitigation is captured in paras 2889–2891 of the grounds of judgment, which was mainly focused on the appellant's role in and contribution to nation building as the Prime Minister:

[2889] In his mitigation, the accused highlighted his key achievements as the Prime Minister of the country for nine years, focusing in particular on the robust economic growth which for the year 2017 recorded a 5.9% increase, and that it was during his premiership that the stock exchange (Bursa Malaysia) witnessed the longest ever bull run in its history.

[2890] He had also overseen the massive infrastructure development in the country, which included public transport and public housing. He emphasised that his contribution for the betterment of the nation was not merely macro in nature but also included significant financial performance registered by Petronas — with had cash reserves of RM120 billion and with public funds such as Amanah Saham Bumiputera, Lembaga Tabung Haji and Lembaga Tabung Angkatan Tentera achieving dividends at record levels.

[2891] The accused said that he had always wanted to create a gentle society, as exemplified by his government's abolition of the Internal Security Act. His administration had also wanted to enact laws governing political donation but the matter did not get the requisite support to be progressed further.

[385] The law mandates that the court shall 'pass sentence according to the law' — see s 183 of the CPC. When the judge is given the discretion to impose the appropriate sentence, any sentence imposed must not only be within the ambit of the statute, but it must also be assessed and passed in accordance with established judicial principles (see *Re Chang Cheng Hoe & Ors* [1966] 2 MLJ 252; [1966] 1 LNS 155).

[386] The learned trial judge had reminded himself of the applicable sentencing principles and taken into consideration the appellant's and his counsel's submission in mitigation; as well as the submissions of the learned deputy on the appropriateness of a deterrent sentence.

[387] In imposing the appropriate sentence, the learned trial judge had taken into consideration the sentencing principle which demands that the courts give utmost importance to considerations of public interest, as was succinctly stated by Hashim Yeop Abdullah Sani J (as he then was) in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; [1976] 1 LNS 102 as follows:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point I need only quote a passage from the judgment of Hilbery J in *Rex v Kenneth John Ball* as follows:
>
> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest.

[388] As to the meaning of public interest, Chang Min Tat J (as he then was) in *Lim Yoon Fah v Public Prosecutor* [1971] 1 MLJ 37; [1970] 1 LNS 66, explained:

> The learned president stressed the public interest in coming to his decision on sentence and was of the opinion that armed robberies should be discouraged by a deterrent sentence. With respect, I would agree. But in this case, it seems to me that in safeguarding the public interest, the learned president had, with all respect, not sufficiently considered the full meaning of that passage from Hilbery J in *R v Ball* 25 Cr App R 164 which he quoted and is now reproduced:
>
> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.
>
> and, in particular the sentence therein which I have emphasised, and applied it to the appellant. A particular criminal may be so induced only by a deterrent sentence of a long term of imprisonment. Another may well profit by being given a second

chance. As the Court of Appeal had said in *Ho Kim Luan and Anor v Public Prosecutor* [1959] 1 LNS 33; [1959] MLJ 159 at p 162:

> Each case, of necessity, must depend upon its own facts and upon the character and antecedents of the offender.

[389] The learned trial judge further alluded to the four key principles and objectives of sentencing, namely, retribution, deterrence, prevention and rehabilitation. He also reminded himself of the principle that 'public interest as such should not only reflect the abhorrence of the society against the crime by the imposition of elements of retribution and deterrence in the sentence, but should also ensure the promotion of rehabilitation and reformation on the part of an accused himself'.

[390] The learned trial judge took into consideration the prevalence of corruption and criminal breach of trust offences in the country and the need for a deterrent sentence to arrest this phenomenon. See *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167; [1987] 2 CLJ 405; [1987] CLJ Rep 209. The learned trial judge also took into consideration that CBT by a servant or agent is a very serious offence and that the sentence imposed should reflect adequately the seriousness of the charges. This is further aggravated by the fact that the appellant when committing the offence held the highest political office of Prime Minister and concurrently was the finance minister.

[391] Having taken into consideration all these factors, the learned trial judge then made the following observation before imposing sentence:

> [2940] There is little merit in this court pontificating and lamenting on why the accused had done what he did, despite (or because of) his undisputed standing at the apex of the vast wealth of power and unparalleled authority. The accused, I repeat, is a person with a keen intellect and must surely have a firm sense of right and wrong. I need only, in concluding to emphasise three points. First, the accused has been convicted of seven serious criminal charges which he had committed when he was the Prime Minister of the country, thus betraying the public trust of this august office. Secondly, he must as a consequence be punished in accordance with the law. Thirdly, it now falls upon me to fulfil my judicial oath to preserve, protect and defend the Constitution in sentencing the accused by ensuring that the provision of art 8 of the Constitution that all persons are equal before the law is upheld.
>
> [2941] Having evaluated the myriad of considerations as set out above, including the near worst case imaginable scenario for each of the charges, the facts and circumstances of the case, his mitigation, the differences in the applicable penal provisions in the Penal Code, the MACC Act and the AMLATFPUAA, and having referred to a number of other relevant cases and in seeking to achieve a sentence that as closely as possible reflect the key sentencing objectives of especially deterrence and retribution (see *Public Prosecutor v Teh Ah Cheng* [1976] 2 MLJ 186; [1976] 1 LNS 116), in my judgment, a balanced determination of the most proportionate,

fair and appropriate punishment for the accused for his conviction for the seven charges are as follows:

(i) For the single charge under s 23 of the MACC Act for abuse of position for gratification — imprisonment for 12 years and a fine of RM210m (in default five years' jail);

(ii) For each of the three charges under s 409 of the Penal Code for criminal breach of trust — imprisonment for ten years; and

(iii) For each of the three money laundering charges under s 4 of the AMLATFPUAA — imprisonment for ten years.

[392] We find that the learned trial judge had adequately considered all factors that were relevant for consideration before passing sentence. He also ordered that all the sentence of imprisonment were to run concurrently as all seven charges were intimately connected with each other (see the Federal Court decision in *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240; [1977] 1 LNS 24. The learned trial judge was also of the view that the concurrent custodial sentence would be more appropriate and consistent with the totality principle (see *Public Prosecutor v Teo Heng Chye* [1989] 3 MLJ 205; [1990] 1 CLJ 194; [1990] 3 CLJ Rep 904), in that a cumulative or consecutive sentence may offend the principle against the imposition of a 'crushing sentence' on the appellant (see *Wong Kai Chuen Philip v Public Prosecutor* [1991] 1 MLJ 321; [1990] 1 LNS 146).

[393] The role of an appellate court when it comes to an appeal against sentence is very limited. An appellate court will not interfere in the trial judge's exercise of sentencing discretion, unless it is shown that the judge had erred in principle, or that the sentence is either manifestly inadequate or grossly excessive. This principle was reiterated by this court in *Public Prosecutor v Ling Leh Hoe* [2015] MLJU 1006; [2015] 4 CLJ 869 where it was held that an appellate court in dealing with an appeal against sentence may only interfere in limited circumstances, where:

(a) the sentencing judge had made a wrong decision as to the proper factual basis for the sentencing;

(b) there had been an error on the part of the trial judge in appreciating the material facts placed before him;

(c) the sentence was wrong in principle; or

(d) the sentence imposed was manifestly excessive or inadequate.

[394] In this respect, the pronouncement by Raja Azlan Shah Ag LP (as HRH then was) in *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83; [1981] 1 LNS 139 has also offered a time tested guideline to appellate

courts in dealing with appeals against sentences:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson* [1952] AC 525 at p 549). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again that it will not normally interfere with sentence, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.
>
> For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion. We are far from convinced that any criticism of the learned judge is warranted. He took the course he did, in outweighing the plea of mitigation in favour of the public interest with a desire to uphold the dignity and authority of the law as administered in this country. We agree. That must receive the greatest weight. It is a serious offence to give false testimony, for it is in the public interest that the search for truth should, in general and always, be unfettered. The courts are the guardians of the public interest (see the *Exclusive Brethren case* [1980] 3 All ER 161 at p 172).

[395] Having been guided by these time tested principles on appellate intervention, we find that the learned trial judge did not err in the application of the sentencing principles, neither is there an error on the part of the trial judge in appreciating the material facts placed before him, nor had he made a wrong decision as to the proper factual basis for the sentencing, nor do we find the sentences to be manifestly excessive. We find that there is proper consideration by the learned trial judge of all factors that are relevant to be taken into consideration in sentencing. In the circumstances of the facts of the case, we do not find the sentences to be grossly excessive. The terms of imprisonment and fine imposed are wholly adequate and commensurate with the nature of the offences. Under the circumstances, we find that the learned trial judge had exercised his judicial discretion appropriately and well within accepted judicial principles on sentencing.

[396] The appellant had personally implored the court to take into consideration his personal circumstances, whilst the trial judge did take that into consideration, in the final analysis public interest warrants custodial sentences. In this regard, the words of Abdul Rahman Sebli J (now FCJ) in *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor* [2013] 8 MLJ 70; [2013] 2 CLJ 686 are appropriate:

> [14] The sentencing court must only consider circumstances that mitigate the crime and not those that are personal to the offender and unconnected to the crime such as hardship to the offender and his family if he is sent to prison. These are matters that the offender should have thought of before committing the offence. If he was brave enough to tempt fate and got caught he must be brave enough to face the natural and probable consequences of his act. But if for any valid reason there is a need to temper justice with mercy a proper balance has to be struck between sympathy for the offender and the pain and suffering that he had inflicted on his victim or the damage that his criminal activity had done to society.

We find that the learned trial judge in imposing the sentence that he did for each of the seven charges, had balanced the interests of the appellant with that of the pain and suffering that he had inflicted upon the nation. He has not merely breached the trust reposted on him but had betrayed it.

[397] And in circumstances such as this, when a prominent political leader of the land is arraigned before the court, convicted and sentenced, we find it would be most appropriate for us to be reminded of the immortal words of Raja Azlan Shah FJ (as HRH then was) as trial judge in *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15, where after having found the accused, who was then a sitting Menteri Besar of Selangor and a political heavy weight of the time, guilty on three counts of corruption, said these immortal words before sentencing him to a term of imprisonment. It would do us well to be reminded of those words:

> It is painful for me to have to sentence a man I know. I wish it were the duty of some other judge to perform that task.
>
> I believe the very extensive coverage of this hearing in the press has permeated all levels of our society. To me this hearing seems to re-affirm the vitality of the rule of law. But to many of us, this hearing also suggests a frightening decay in the integrity of some of our leaders.
>
> It has given horrible illustrations of Lord Acton's aphorism 'power tends to corrupt, and absolute power corrupts absolutely', and has focused concern on the need of some avowed limitations upon political authority.
>
> I repeat what I had said before — the law is no respecter of persons. Nevertheless it will be impossible to ignore the fact that you are in a different category from any person that I have ever tried. It would be impossible to ignore the fact that, in the

eyes of millions of our countrymen and women, you are a patriot and a leader. Even those who differ from you in politics look upon you as a man of high ideals. You had every chance to reach the greatest height of human achievement. But half-way along the road, you allowed avarice to corrupt you. It is incomprehensible how a man in your position could not in your own conscience, recognise corruption for what it is. In so doing, you have not only betrayed your party cause, for which you have spoken so eloquently, but also the oath of office which you have taken and subscribed before your Sovereign Ruler, and above all the law of which you are its servant.

You insisted that the pay-offs were in fact political contributions given and received in keeping with long-established practices and they had been made to look criminal by a hostile witness, scuttling to save his own skin. But the evidence plainly show that you devised a scheme of unparallel cunning and committed an almost perfect crime. But crime, though it hath no tongue, speaks out at times. Your method is your own doing because even the long arm of coincidence cannot explain the multitude of circumstances against you, and they destroy the presumption of innocence with which the law clothed you.

Political contributions have been a highly-organised professional obligation in Europe and in the States; they are a sign of the times. Malaysia, it seems to me, is emulating that way of life. Whatever may be the moral of it, so long as they are not given and received for the corrupt exercise of official functions, they are not a crime.

I believe that for the past few months you have suffered something like tortures of hell. The deprivations and sufferings you and your family went through should be enough penance.

It is also true that for a public official who rose so high, disgrace and banishment from public life are severe punishment indeed. I have duly taken that into consideration and also what has been said by your counsel.

[398] And some 45 years later these words still bear relevance to the appellant, and where we as a nation find ourselves at now. The 'frightening decay in the integrity of some of our leaders' that Raja Azlan Shah AgLP (as HRH then was) warned us of 45 years ago is still a scourge that plagues this beautiful nation. The courts in upholding the rule of law would have to do what is necessary to ensure that this modern day plague is eradicated for the good of the nation. The law is indeed 'no respecter of persons'. All men are equal before the law, and the courts apply the law equally to all.

CONCLUSION

[399] In the final analysis, we dismiss the appellant's appeal against both conviction and sentence on all charges and affirm the orders of the High Court.

A *Appeal dismissed; orders of High Court affirmed.*

Reported by Ashok Kumar

B

C

D

E

F

G

H

I